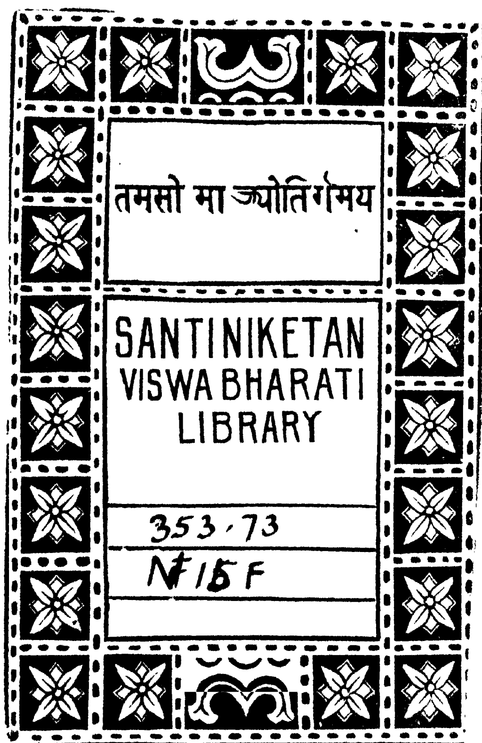


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THE FEDERAL SYSTEM OF THE UNITED STATES OF AMERICA

THE FEDERAL SYSTEM OF THE UNITED STATES OF AMERICA

(A Study in Federal-State Relations)

BY

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PREFACE

During the years 1937-39, the people of the United States celebrated the one hundred and fiftieth anniversary of the framing, adoption and first operation of their Constitution. The long period of one hundred and fifty years which has elapsed since Washington entered the city of New York as the first President of the Republic has seen few formal changes in the Constitution which the wise fathers succeeded in fashioning after four months of arduous work at Philadelphia. It has been amended so far only twenty-one times and none of these twenty-one amendments were intended to make any basic alteration in the federal structure of the country.

It is no wonder on this account that many who may be expected to know better have still the illusion that the federal system of the United States retains exactly the character which was given it by the fathers. They still emphasise the residuary powers of the States and the delegated character of the jurisdiction of the Central Government. They still appear to swear by the observation which De Tocqueville made one hundred years ago that government by the Centre was the exception while government by the States was the rule in the United States of America. They seem to ignore the fact that although technically the States still enjoy the residuary authority

and the Central Government only delegated powers, these no longer give any correct idea about the position and powers of the Federal Government in the United States.

In the following pages an attempt has been made to describe the relations which subsist today between the federation and its units and to trace the steps and emphasise the factors of the growth of this new relationship. I do not claim that these relations between the Union and the units have been described here in all their aspects and bearings. The lines of development of central jurisdiction have been many and varied. It has not been possible to deal with all of them in a treatise of its present size and compass. In fact, as one writer has observed,* "To attempt to study all the federal-state arrangements in all their manifold relationships to the federal government and to all the states would doubtless be a work of supererogation and would certainly be the task of many lifetimes." In the present work have been emphasised only those lines of development of federal power which have appeared to me to be of sufficient importance for mention.

As for the plan followed in the book, I do not think any explanation is necessary. Only in regard to the development of central power by a

* Jane Perry Clark—The Rise of a New Federalism (1938), p. x.

liberal interpretation of the commerce clause and by the system of grant-in-aid, the arrangement of the plan may be briefly stated here. In Chapter VIII it has been explained generally how by a liberal interpretation of the clauses of the Constitution, functions not specifically granted to the Federal Government were gradually arrogated to it. Then in Chapter XII it has been shown how by the liberal interpretation of a particular clause, namely the commerce clause, federal jurisdiction has been so much widened. Lastly, it has been shown in Chapter XIII how by the liberal interpretation of the commerce clause in a more particular field, the Wagner Act was passed and the National Labour Relations Board was set up and how as a result of the working of this Board central jurisdiction has been exercised in a field which was certainly not included in the ambit of federal authority by the fathers. Similarly in regard to federal grant-in-aid, in Chapter XIV the evolution of the system of federal grant-in-aid in the United States has been traced and its effect on federal-state relations has been generally estimated. The following chapter, however, has been devoted to the working of this grant-in-aid in a particular sphere. In this chapter the activities of the Social Security Board have been discussed in some detail in order to illustrate the federal-state co-operation which the system of grant-in-aid has made possible.

The book is the result of work which I had the opportunity of undertaking as Sir Rashbehary Ghose Travelling Fellow of the Calcutta University for the year 1938-39. In view of the fact that an All-India Federation had been envisaged in the Government of India Act, 1935, the University was convinced that there was utility in the study at first hand of the federal systems at work in other countries, particularly in the United States of America and the Dominion of Canada. It was with this object in view that the Travelling Fellowship, referred to above, was made available to me. My thanks are due for this act of confidence to the authorities of the Calcutta University, particularly to Dr. Syamaprasad Mookerjee, who was then the Vice-Chancellor and whose encouragement was a source of inspiration.

The preliminary work was done at the London School of Economics and Political Science, at the library of which I had full facilities for collecting many necessary materials. In this connection I am thankful to Dr. Herman Finer, Reader in Public Administration in the University of London, whose advice on some points was particularly helpful. The work begun in London was continued for four months at the Columbia University, New York. In this institution I had at my disposal the resources of its famous library. I also enjoyed the benefit of personal talks with some of the professors of this University. I am particularly thankful to Dr. Arthur W. Macmahon,

Professor of Government and to Dr. Schuyler C. Wallace who was then acting as the Executive Officer of the Department of Public Law and Government.

I also visited several other University and political centres in the U.S.A. including Chicago, Madison (Wisconsin), Pittsburgh, Philadelphia and Washington. In these places I had an opportunity of visiting several relevant institutions, meeting certain people who could speak with knowledge and authority on the subject I had taken up for study and securing certain necessary papers and documents. In this connection my thanks are particularly due to Professor Ogg of the Wisconsin University and to Professor Kerwin of the University of Chicago. I am also grateful to Mr. Thomas Green (Jr.) of the Council of State Governments, Chicago, who, in the absence of the Director of the Organisation, gave me all information regarding the nature of work which it was doing and also placed at my disposal the relevant literature on the subject. I also take this opportunity of thanking the officials of the Federal Government at Washington, particularly of the Department of Agriculture, and of the Social Security Board and the National Labour Relations Board, for kindly providing me with necessary literature regarding the activities of these bodies.

The chapters on Federal Grant-in-Aid and Centralisation and Inter-State Trade Barriers and Federalism were read by Dr. J. P. Niyogi,

University Professor of Economics, and most of the other chapters were read by Professor S. C. Sarkar, M.A. (Oxon.), of the Presidency College, Calcutta, before their submission to the press. I am grateful to them for the trouble they took in this connection and for the suggestions they made. I should, however, add that they are not responsible for any of the mistakes and misprints that may have crept into the book inspite of all efforts to avoid them.

Before I conclude this short preface, I offer my hearty thanks to the staff of the Central Library, Calcutta University, and particularly to Mr. B. N. Banerjee, Deputy Librarian, whose ungrudging assistance has been uniformly available to me. I take this opportunity also to record my gratitude to Mr. J. C. Chakravorti, M.A., Registrar, Calcutta University, who took a keen interest in the publication of the book and to Mr. Ramaprasad Mookerjee, M.A., B.L., and to Mr. P. N. Banerjee, M.A., B.L., Barrister-at-Law, M.L.A. I am also thankful to the staff of the Calcutta University Press for the careful work they have done.

In regard to the use of capitals, I should point out here that certain words have been made capital in one sense and not in another. The word state, for instance, has been made capital only in the sense of federal unit of the United States of America. Then as regards the words used in the constitutions and statutes, I have used them in the same form when quoting these constitutions (*e.g.*, Articles of Confederation).

N. C. Roy.

THE FEDERAL SYSTEM OF THE U.S.A.

CHAPTER I

Forces underlying the Constitutional System of 1789

The constitutional system as inaugurated in 1789 has been aptly described as dual federalism. It was a half-way house between absolute centralisation and absolute separation. The thirteen American States were not brought completely and wholly under the control of a central government, nor were they left exclusively to their own separate governments for the management of their affairs. In respect of certain matters they were placed under the jurisdiction of a central authority, but in respect of other matters they continued to be under the control and direction of their own separate governments.

This compromise between complete separation and complete centralisation was, as Dicey has remarked,[1] the outcome of a desire among the peoples of the thirteen States for union only and not for unity. They were in favour of a union in which they would have opportunity of working together for common ends but in which at the

[1] Law of the Constitution, p. 137.

same time their separate local life would not be merged altogether. They felt the necessity of establishing a union, so that as members of this entity they might face the outside world more confidently and more vigorously and so that they might solve some of their common problems more expeditiously and more efficiently. At the same time, however, they were insistent on maintaining the separate identity of their States and the organic character of their local life. Their day-to-day life they would live in their own way. Their local affairs they would manage on their own responsibility and according to their own lead and light. They would resist all interference from outside in these intra-state questions. So in the scheme of things which they ultimately succeeded in fashioning, the central and state governments would work side by side, each responsible for its own duties, one fostering the national traditions of the country and enriching the national life of the people and the other maintaining the local traditions of the States.

The question now is as to how and why the peoples of the thirteen States developed this peculiar sentiment—the sentiment as a result of which they desired union but not unity. The reply to this question consists in the simultaneous working, upon the mind of these peoples, of a number of both centrifugal and centripetal forces. There were some forces and factors at work in the

thirteen States, which made the people local and separatist in outlook. There were, however, other forces at work as well in these territories, which created in the mind of their citizens a sense of national unity and developed in them a common national or American patriotism. Let us first of all think of the separatist factors and deal with them one by one.

All the thirteen States[2] were, during their colonial period, subjected to the control of His Majesty's Government in London in regard to certain important matters. The influence of this subjection to a common authority need not be minimised and will be evaluated in its proper place. But here it should be emphasised that, although the Government at Westminster was the paramount power for all the colonies and as such was a connecting link and a binding element among them, still the fact should be reckoned with that each colony was for all local purposes administered and governed by a separate authority of its own. The affairs of each were the concern of its own respective government. It was but inevitable that round this autonomous government a separate body of traditions and loyalties would grow in every one of the colonies.

[2] Their origins as British colonies were different. Established at different times by different methods and with different motives, they naturally and inevitably developed on different lines.

A separate government has everywhere and in all ages been found to foster a local outlook and a local patriotism. If the government is vested in a hereditary ruler, it is round his family that this patriotism is very easily and spontaneously developed. But even if the government is otherwise constituted, a strong local feeling is fostered all the same. Even when the administrative authority of a particular area is positively subordinate in character, it has been found to create among the people under its jurisdiction a feeling of compactness so far as they themselves are concerned and a feeling of separation in regard to outsiders. The districts in the provinces of British India are mostly artificially carved out revenue and administrative units. These areas had hardly ever any local compactness and any common local tradition before they were constituted as administrative districts. But, within a few decades of their creation, they became a source of pride and affection to their inhabitants. A local patriotism has now grown among these latter and they not unoften think in terms of the district to which they happen to belong.

If a subordinate administrative authority may produce a result like this, it can be imagined at once as to what great extent will local feeling be fostered by an autonomous government of a colony. In fact, each colonial government helped in the creation of an intense local patriotism.

This was all the more possible because the colonial government was very greatly democratic in character. The representative assembly constituted by the nominees of the people had a real voice in the formulation of the general policy of the colony. Naturally the people would think in terms of a territory in the management of whose affairs they themselves participated and it was equally in the nature of things that they would be cold and indifferent towards the neighbouring territories whose affairs were managed by others. It should be remembered also in this connection that all the colonies were not of the same status and of the same position. There were in the first instance two types of colonies—those which were corporate colonies and those which were provinces. The provinces were again of two kinds—those which were proprietary and those which were royal.[3] We need not here enter into their respective characteristics. It will suffice here to say that the differences in their status and consequently in their governmental powers and peculiarities made social and political traditions also different in their respective territories.[4]

[3] A. C. McLaughlin—A Constitutional History of the United States, p. 7.

[4] It should be emphasised also that the colonies, when they became States after their secession from the British Empire, framed constitutions, each in its own way and at different dates (Virginia in 1776, New York in 1777, Massachusetts in 1780, etc.). Inspite of many similarities, these constitutions differed also in many essentials and

The seperatism engendered by the different governments was strengthened by the diversity of social, economic and religious practices in the various colonies. If these practices were uniform throughout America, possibly the separatism referred to above might have been considerably mitigated. But actually they were not only diverse but also antagonistic. In Virginia the people who politically mattered in that age were nurtured in patrician traditions and believed in the predominance of the landed magnates. They held large agricultural estates and lived in grand style. Their lands were cultivated by slave labour in which institution most of them had pathetic confidence. Just like Virginia several other colonies in the south were also mainly agricultural and people depended for their livelihood on the yield of their lands. In New England colonies, however, prospects of agriculture were hardly encouraging. And those who were engaged in it also differed very widely in outlook and practices from the Virginian patricians. Large estates were out of the question in these territories. The agriculturists were small landholders and lived as modest a life as that of simple artisans. But anyhow their number was small and the bulk of the people had to depend either upon some kind of industry or upon fishing. Different kinds of

naturally the traditions fostered by these constitutions differed to a great extent in fundamentals.

manufactures soon came to engage the attention and industry of the people. Spinning and weaving of cloth, tannery, manufacture of hats and that of agricultural implements—all these were gradually undertaken. Now the general outlook and habits of life fostered by agricultural occupation are usually different from the outlook and habits which characterise an industrial people. It was but natural and inevitable on this account that the peoples of the manufacturing and industrial colonies would differ in essential particulars of their life from the peoples of those colonies where agriculture was the main occupation of the citizens.

The prejudice created between one group of people and another by the differences in their outlook and habits of life was again accentuated by the fact that the peoples of the different colonies lived, as a rule, a life of isolation from one another. Communications were either bad or altogether non-existent in the 17th and the greater part of the 18th century. It was almost an impossible feat even for adventurous people to go from one colony to another by land. Madame Knight has left it on record how in 1704 when she made the greater part of her journey from Boston to New York on horse back, she encountered one horror after another on the way. There were neither sufficient men nor sufficient skill and energy to level the hills and drain the marshes in

order that roads might be built and communications developed between one State and another. Professor Morison, the author of the Oxford History of the United States, brings out into graphic relief the difficulties and dangers of land communication of those days. "It was almost as difficult to convene the first Congress of the United States," he observes, "as in former times the Councils of Constance and Basel. There was a main post-road from Wiscasset in Maine to Savannah in Georgia, over which passengers were transferred in light open stage-wagons, in approximately as many days as the railway now requires hours. It took 29 days for the news of the Declaration of Independence to reach Charleston from Philadelphia."[5] Necessarily in the absence of good communications the peoples of the thirteen colonies had very little touch with one another. This isolation in its turn could not but have strengthened the prejudice which one group already cherished against the other.

There was again another factor whose importance in the 17th and 18th centuries none would fail to emphasise. This was the factor of religion. Nothing united people more in those days than unity in religion and nothing divided them more than its diversity. In Europe in the 18th century religion had no doubt ceased to be the determining factor in the relations between man and man. In

[5] Vol. I, p. 8.

the new world, however, its influence was still to be reckoned with. When in 1774 Roman Catholicism was recognised in Canada by the British Parliament in the Quebec Act, the people of the thirteen colonies thought it right to protest very strongly against this recognition of popery. People with such an attitude of mind were not expected to cherish very good feelings towards one another simply because they were all Christians. It is true that the number of Roman Catholics in the thirteen colonies was very small. But there were the quakers in Pensylvania, the dissenters in New England and the episcopalians in Virginia. They certainly looked at one another without much pleasure and cordiality. This religious diversity became in fact an important factor of localism. It helped people to think in terms of their own colony and look only in suspicion beyond its borders.

Apart from the forces of separatism which have been dealt in the previous paragraphs, there was one other force which tended in the same direction and which also should be explained here. People in every one of the colonies sincerely believed during the revolutionary era that popular government which they prized so much was possible only in small communities. The government, they thought, would work in conjunction with public opinion only so long as it happened to work under the very eyes of the peeple. But this contingency

was possible only when the jurisdiction of the government ran over a small area. If the territory to be administered by a government was vast and far flung, the authorities would no longer work under the censorious eyes of the people and the government would tend on that account to be less and less responsive to public opinion and more and more despotic in its policy and activity. The headquarters of the government would be located in a place inaccessible to most people whose voice of protest would hardly ever reach it in time and whose approval also would similarly have little opportunity of being conveyed there to encourage the authorities. The latter would in consequence become gradually indifferent to the opinions and views of the general people and would carry on the government in their own way insensible to the wishes and aspirations of the mass of the people.

The American people had become convinced as to the correctness of this point of view by the policy which the English Government had pursued in their country since the accession of George III. It is true that the peoples of the thirteen colonies had always entertained suspicion against a government which might be situated at a great distance. It was because of such suspicion that they did not approve of the project of an American union and an American central government which was planned in Albany in 1754. But it was the policy of the Governments of George III which streng-

thened this convinction all the more. London was far away. It was inaccessible as a rule to the people of the colonies. It did not know much about them and was not in the least guided by their wishes and desires. It was on this account that the measures which the British Government thought right to adopt proved to be so oppressive and tyrannical in the eyes of the peoples of the colonies. What happened in the case of the Government located at London might and would happen also in the case of any other government distant in location and deprived in consequence of the wholesome influence of the local people. So it was argued that it was better for the peoples of the different colonies to remain separate under their own governments than to be united under one strong central government with its headquarters at a great distance.[6]

Now the forces of separatism as delineated above were to some extent offset by the opposing forces of union, which also were simultaneously at work in the colonies. Nationalism was a sentiment which certainly imbued the mind of the people in Western Europe to a great extent long before the French Revolution. But it was only as a result of this Revolution and the wars which followed it that nationalism became a political creed in the world and a great force in shaping the destiny of many of its states. In the new world

[6] C. E. Merriam—A History of American Political Theories, p. 78.

as in the old the idea was not yet acknowledged as a political principle. It was, however, there in an insipient state. Many of the factors which help in building up a nation were present among the thirteen communities whose separation from Great Britain was formally acknowledged in 1783. There was in the first place the fact that the citizens of the thirteen States had mostly been descended from the British stock. There were no doubt the Dutch on the Hudson and the French on the Maine but generally it could be said that people organised in thirteen communities had the same racial traditions behind them. Their medium of expression was also the same. All spoke the same language. This was certainly as important a factor to be reckoned with as the unity of race. Nothing divides people so much as the diversity of language and nothing unites them more than its identity. It was but inevitable that people, however geographically and administratively separated, would feel drawn towards one another by the influence of these two factors. When they knew that the people of the neighbouring state were descended from the same forefathers as they themselves were and when they found that they spoke the same language and expressed mostly the same ideas through the same vehicle, they could not but regard them as their own kith and kin, not to be kept at an arm's length but to be welcomed into their midst.

The sense of union thus engendered was strengthened by several other factors whose importance also must not be minimised. There was the outstanding fact that although the colonies had for all local purposes their own governments, yet the affairs which were supposed to be common among them were administered on the responsibility of His Majesty's Government at Westminster. The functions so reserved were the regulation of trade by Parliament and the management by the Crown of the post-office, foreign affairs, war and peace, the army and navy, Indian affairs and some such other subjects. So although the colonies later detested the policy pursued by the distant Government at London, still they had become accustomed for long to live under one common authority for certain important purposes of government and administration. This habit to live under one common authority could not but have fostered a tradition of unity among the thirteen communities. This tradition became all the more marked because of the fact that as a result of the exercise of governmental authority by Whitehall over all the thirteen colonies a common system of law was built up to a considerable extent in their territories.[7]

[7] Apart from the common system of law developed by the common British Government, it is important to remember that the people of the colonies were the inheritors of the English common law as well. Most of them were either immigrants from England or the descendants of

Then there was the fact that for years together the colonies had fought British imperialism side by side for the common cause of maintaining their liberty and freedom against the encroachment of the unimaginative Government of the mother country. The memories of the War of Independence in which all the colonies made so much sacrifice must have been in fact a great stimulus to the sense of union among them. It is true that after the War had been successfully brought to a close, emphasis was placed in all the States not upon their union, not upon their common interests, but upon their local freedom and independence. They placed all the emphasis upon the fact that they had fought the War of Independence for freedom and this freedom they could enjoy best as independent States. But, although this was the immediate reaction of the separation from the mother country, this unfortunate state of mind could not be permanent. Sooner or later the memories of common struggle against Great Britain must assert themselves as a unifying force.

In view of the contradictory forces which were at work in the thirteen States and which have been delineated in the foregoing paragraphs, it was not

these immigrants. Naturally they had their life regulated by this common law in all the colonies. Secondly, it should be emphasised that the colonials everywhere shared the same political ideas. John Locke was recognised as the Master in all the colonies and his Civil Government was held in the same esteem and veneration as Das Capital is held in communistic circles to-day.

only not unnatural but inevitable that, while the peoples in these territories would be prepared to surrender a portion of their public authority to a central government, they would not in any way agree to a complete absorption of their separate communities in a union of states. The ground was in fact set for a federal union but not for any centralised 'legislative union.'

CHAPTER II

CONFEDERATION

When the colonies were putting up a fight against what they regarded as unjustified and illegal invasion upon their rights by the British Parliament, they naturally felt the necessity of a common medium of expression and a common instrument of action. So far the British Government was the only binding element among them. Now that they had to engage in a struggle against that very factor, they were constrained to forge a new instrument of common action. For over two years they carried on their struggle against Great Britain through the Continental Congress which however was only an extra-legal body, consisting of delegates from the different colonies.[1]

That this arrangement could be only temporary and that some common central machinery of government should be formally established without delay was brought home to men like Benjamin Franklin as early as 1775. On the 21st July of that year he sketched a plan entitled "Articles of Confederation and Perpetual Union of the

[1] "Constitutionally, it was little more than a supreme war council of thirteen allies." See S. E. Morison—Sources and Documents illustrating the American Revolution (Oxford, 1923), p. xl.

Colonies." For the time being, however, nothing came of his plan. It proved abortive. But when one year later the Declaration of Independence was adopted, the colonies could not but think seriously of establishing some sort of a formal union among themselves. Both for military as well as for diplomatic purposes the formation of a common central government was essential. So the Congress took up this question in greater earnestness and the Articles of Confederation were adopted by this body in November, 1777. It could not be said that the Congress had adopted the Articles in a hurry. It had deliberated upon them for over a year.

But even then the adoption of the scheme of confederation by the Congress alone did not take very far the business of forming a union among the colonies. The Articles adopted had to be submitted to the thirteen colonies for approval and acceptance. They did not, however, seem to be in a hurry to announce such approval and acceptance on their part. The colonies were now engaged in a life-and-death struggle against the British Government and it was expected that they would at this moment think more of their common future and less of their local interests. But even during the War they placed the question of their local freedom above the common interests of the colonies together. Some of them indeed expressed their approval shortly after the Articles had been sub-

mitted to them for consideration and acceptance. But some held out unreasonably long. It was not till 1781 that Maryland agreed to sign the Articles and consequently it was not before that year that the Confederation could be launched.[2]

The Confederation thus established conformed, as a writer[3] puts it, to the idea of a co-operative system of sovereignties. The sense of separate independence among the colonies was too keen and their mutual suspicion too strong for any union with a sovereignty of its own to be formed at this time. What could be established during the period of the War of Independence was only a loose union, a league of sovereign states. Article II of the Constitution of the Confederation declared in so many words that "each state retains its sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled." The contents of Article III are also worth study in this connection. "The said States," it runs, "hereby severally enter into a firm league of friendship with each other, for their common defence, the security of their Liberties, and their mutual and general

[2] But although the Confederation was formally launched in 1781, for some years before that the Congress had acted more or less on the basis of its Articles. See Max Farrand—The Framing of the Constitution (Yale University Press, 1913), p. 3.

[3] McLaughlin—A Constitutional History of the United States, p. 119.

welfare. . . ." This would show definitely that by the adoption of the Articles of Confederation the thirteen sovereign States entered into an alliance for some specific purposes. In other words what was achieved by it was that the thirteen sovereign States would co-operate in regard to certain definite subjects through a central machinery of government. Beyond this co-operation for these specific purposes, the thirteen colonies which by secession from the British Empire became independent entities would continue to enjoy their independence and sovereignty.

That the union set up in 1781 was a league of sovereign States is illustrated in the first instance by the fact that in its supreme organ,[4] the Congress, all the States were on an equal footing. The delegation from each State consisted of not less than two nor more than seven members. The delegates voted by States, each delegation exercising one vote (Art. V). It was proposed no doubt that in the Congress the different States should have votes in proportion either to their population or to their wealth. But the smaller States refused to entertain such a scheme. They were entering the union as sovereign units and as sovereign units they were equal. Their voting strength in the Congress also should in consequence be equal. It should be emphasised in this connec-

[4] In fact this was the only central organ. There was no executive except the committees of Congress.

tion that the delegates of a State were appointed annually in a way prescribed by its own legislature, that they were maintained at the expense of the State concerned, and that they were subject to recall at any moment by the State Government. These certainly would lend strength to the view that the Congress was not the organ of an independent sovereign union but was a body of ambassadors of a number of sovereign States.

That the union was a league of sovereign States is further illustrated by the fact that the Articles of Union could not be altered or modified unless the amendment was first agreed to in Congress and then confirmed by the legislatures of all the States (Art. XIII). Such unanimity could be necessary only in a union where the units still possessed full degree of their sovereignty. It should also be remembered in this connection that the vote of nine States in Congress was necessary for the discharge of all important functions.

Thirdly, the sovereign character of the States is brought out by the fact that although the Central Government was assigned jurisdiction over certain important functions, it was not given any right to raise money from the people on its own account. The Congress was given exclusive jurisdiction over the management of foreign relations. It alone was to send and receive an embassy. It alone was to enter into treatise with foreign countries. Similarly the questions of war and peace were also

to be decided by this authority. The army was to be organised, ships were to be built and, in one word, every arrangement for the defence of the country must be made by the Congress. But it was not entitled to raise money by taxation on its own initiative and responsibility. All that it was to do was to make requisitions to the authorities of the States, which would, at their discretion, raise the money requisitioned and submit it to the Congress.

In other words the Congress would have no direct relation with the people of the union. Between the people and the Central Government was interposed the authority of the States, upon whose good sense and generosity the Central Gevernment was to be dependent for the conduct of its day-to-day work. Similarly the Congress might lay down measures for the discharge of its constitutional responsibilities but these measures it could not enforce among the people through its own instrumentality. The Confederation had no excutive of its own beyond the committees "which the Congress might establish to work under its direction." "Under such conditions the decisions of Congress were little more than recommendations,"[5] for the execution of which it was dependent upon the good will of the sovereign States.

The right to impose customs duty is an important symbol of sovereignty. It should be

[5] See Farrand—The Framing of the Constitution, pp. 3-4.

emphasised here that this right of regulating commerce was not surrendered by the States to the Congress in 1781. The latter body was to manage the foreign relations of the union no doubt. But it was not given the right to enter into any commercial treaty with a foreign power. In fact both foreign and inter-state commerce were within the jurisdiction of the several States. Not only the Congress could not settle the commercial policy of the United States towards a foreign country but what was worse it could not even see to it that there was a free flow of goods from one end of the union to the other. The result of this arrangement was disastrous. Great Britain was pursuing a commercial policy injurious to the trade and navigation of the United States but the latter could undertake no countervailing policy. The Governments of the thirteen States which alone could deal with the subject could not evolve a common line of action to meet the attack. In fact, instead of undertaking a common countervailing policy towards Great Britain, they proceeded to resort to measures which hurt one another and therefore helped foreign powers. They passed customs laws which set up trade barriers among one another and in consequence embittered their relations. More than one hundred years later Mr. James Service pointed out in the Melbourne Conference which met in 1890 to discuss the possibilities of a federal union among the Australian Colonies that separate

jurisdiction of the States over their fiscal policy was the greatest obstacle in the way of a true union. "I have no hesitation in saying," he observed, "that this is to me the lion in the path; and I go further and say that the Conference must either kill that lion or the lion will kill it . . . To my mind a national government without a uniform fiscal policy is a downright absurdity."[6] The truth of this remark was felt more by none than by the people of the United States during the period of the Confederation. Sovereignty of the States in regard to fiscal policy made the Central Government impotent in its relations with foreign states and at the same time it strained the relations of the States themselves to the breaking point.[7]

The Confederation established in 1781 had of course the good effect of accustoming the States to a central government. As colonies they had lived under the common authority which was enforced from London. As States they now lived under one government which was their own creation. It was true that this government was too weak and too powerless. But still it was there as the symbol of union and as an embodiment of the interests which all the States had in common. But although to this extent the Confederation,

[6] B. R. Wise—The Making of the Australian Commonwealth (1913), p. 50.

[7] See Madison's Preface to his Notes on the Debates in the Federal Convention. G. Hunt and J. B. Scott—" Debates in the Federal Convention of 1787......Reported by James Madison," pp. 6-7.

completed in 1781, rendered a service to the cause of union among the States, still its pitfalls in other respects were far too many and far too grave. It appeared that because of the extreme impotence of the Central Government the States would again become a prey to the economic and political ambition of foreign nations. There was every danger that, unless the union was strengthened and a central government was constituted with real authority to deal with foreign countries in respect of trade and commerce and war and peace, all that had been achieved by the common sacrifice of the thirteen communities during the War of Independence would be lost altogether.[8]

[8] In Great Britain it was confidently expected by a section of the people that the Union would dissolve and English influence, if not power, could again be supreme in the States. None engendered this belief more than Lord Sheffield.

CHAPTER III

THE FEDERAL CONVENTION

It was only slowly that the peoples of the different States were convinced of the breakdown of the Confederation. It took long to bring home to them the necessity of amending the Articles of Confederation. Even then it was not out of a conscious and pre-conceived plan that the Federal Convention of 1787 was set up. This idea grew really out of a chain of events. In 1784 an amendment of the Articles of Confederation was proposed. If it was adopted, it would have conferred upon the Central Government only sufficient power and jurisdiction for the regulation of foreign trade. But even this amendment had the support of only two States. It fell through in consequence. Centrifugal forces were too strong even for the adoption of this limited amendment.

Gradually, however, the temper of the people began to relax. The two neighbouring States of Virginia and Maryland had come to an agreement [1] among themselves regarding the navigation of the Chesapeake Bay. It was thought that, if the two States could discuss and decide their

[1] This agreement was illegal under the Articles of Confederation which demanded that the consent of the Congress must be obtained for such an agreement. But this consent was not secured.

disputes through a conference, all the thirteen States also could solve their outstanding commercial differences by a similar conference. Accordingly such a conference was invited to meet at Annapolis in Maryland.[2] But the response was poor. Only five States sent their delegates. It is true that at least four other States had appointed Commissioners, who, however, did not show any desire to attend in time. Among those who attended were James Madison from Virginia and Alexander Hamilton from New York. They were enthusiasts in regard to the strengthening of the Union. The Commissioners who attended drew up a report and submitted it to their respective State Legislatures.

In this report they referred to the defects of the existing Union and to the necessity of calling 'a Convention of Deputies' from the different States, so that a plan 'for supplying such defects' might be digested and formulated. They even went to the length to suggest that the deputies of the different States should be appointed early, so that they might meet on the second Monday of May, 1787, and consider a plan for rendering "the Constitution of the Federal Government

2 The initiative had been taken by Virginia in this regard. It appointed Commissioners early in 1786 "to meet such Commissioners as may be appointed in the other States of the Union, at a time and place to be agreed on, to take into consideration the Trade of the United States."

adequate to the exigencies of the Union."[3] The Virginia legislature responded very promptly to the suggestions of the Annapolis delegates and saw to it that a delegation was immediately appointed to Philadelphia in the same way as the delegation of the State in Congress. Within a few weeks four other States[4] followed suit and appointed delegations. But the Congress, which was the only body under the Articles of Confederation to propose an amendment to the existing system of union, had so far maintained complete silence about the proposed Convention. It was not, in fact, till February 21, 1787, that the Congress was persuaded to pass a resolution in favour of such a Convention.

The Federal Convention, which met at Philadelphia in May, 1787, and successfully grappled with the task of framing a constitution for the thirteen States, was attended by 55 delegates. They were sent by twelve of the States. Rhode Island refused to the end to have anything to do with this Convention. The delegates were almost all of them men of affairs, with varied experience of men and things. The constitution of the United States was, in fact, framed not by doctrinaires, but by practical men who had definite and clear ideas as to the needs of their country. A distinguished writer, after an analysis of the antecedents

[3] Farrand—*Op. cit.*, pp. 9-10.

[4] Pennsylvania, North Carolina, Delaware and Georgia.

of the members of the Convention, has pointed out that, of the fifty-five delegates, thirty-nine had served in Congress, eight had signed the Declaration of Independence, eight had helped in shaping State Constitutions, seven had been Chief Executive Officers of their States and twenty-one had fought in the Revolution.[5]

The first and foremost among those who attended the Convention as delegates was George Washington. 'He was 55 years of age and at the height of his popularity.' None inspired greater respect and devotion than he did at this hour, and it was fortunate that he not only attended the Convention but, as we shall soon see, was also called upon to preside over its deliberations. Among the other delegates, were James Madison of Virginia who later on became the President of the United States, William Paterson of New Jersey and Benjamin Franklin, James Wilson and Gouverneur Morris of Pennsylvania. John Dickinson, the author of 'Farmer's letters' and Chairman of the Committee of the Congress which framed the Articles of Confederation, attended, as a delegate, from the State of Delaware. Alexander Hamilton, later the joint author of the Federalist and Secretary of the Treasury under Washington, attended as a delegate from New York. He could not exert as great an

5 Charles Warren—The Making of the Constitution, p. 55.

influence over the deliberations of the Convention as his parts would justify. The reasons for his comparative ineffectiveness in the Convention were these. In the first place, he was out of sympathy with the plans of union which had been placed before the Convention. Secondly, he was overruled on all occasions by his colleagues from New York. Connecticut was represented at the Convention by Dr. Samuel Johnson, who, at the age of 60, was reputed as the most learned man in the States and who had just been elected President of the Columbia College at New York, and by Oliver Ellseworth who had become a Judge of the Supreme Court of his State.

Verily the Convention consisted of most outstanding men of whom any nation could be proud. Thomas Jefferson who was, at this moment, in Paris, wrote to John Adams to say that the Convention "is really an assembly of demi-gods." As it has been mentioned already, George Washington was chosen to preside over the Convention. Benjamin Franklin was the Governor of the State at the capital of which the Convention was meeting and as such courtesy might have demanded that he should be called upon to preside over the deliberations of the Convention. But Robert Morris, a delegate from Pennsylvania itself, was resposible for making the proposal that Washington should become the President. We are told further that, if the weather was not as

inclement as it happened to be, Franklin himself would have attended the meeting and proposed the name of Washington for the Presidentship of the Convention. Possibly Franklin regarded himself as too old to undertake the arduous responsibility of presiding from day to day over a body which was to shape the destiny of the country. We may repeat that it was fortunate that the Convention could have Washington for its President. Without his directing skill and without his personality which inspired both awe and veneration, the Convention would have possibly broken down on the rocks and shoals which were ahead.

The Convention very correctly represented the forces which were at work in the country at this time and which have been delineated at some length in a previous chapter.[6] There was a general unanimity indeed in respect of the fact that the Union which already existed required to be considerably strengthened. But beyond this there were two or rather three opinions in the Convention. There was in the first place the standpoint of Alexander Hamilton who, as we have seen, was one of the delegates from the State of New York. The plan which he had framed and which he placed before the Convention had much in common with the system which eighty years later Sir John MacDonald tried to persuade

[6] Chapter I.

his colleagues in Canada to adopt. Hamilton's mind had been working towards "a solid coercive union" among the States for over seven years before the Convention happened to meet at Philadelphia. He had nothing but contempt for a loose union in which the small petty States would, in their perverse jealousies towards one another, have everything in their own way and the central government would have little opportunity of accomplishing anything substantial and grand. So he proposed a union in which the central government would be strong not only by virtue of the many important and vital functions with which it would be endowed but also by virtue of the fact that it would be possible for this government to control the governments of the States in their own sphere. The governors of these States would not be elected by the people of the respective territories but would be appointed by the central government and would hold office during its pleasure. Through these functionaries who would have a power of veto over the measures passed by the local legislatures, the central government would find it easy to set its foot down over any action which was contemplated by the State legislatures but which it might not like for one reason or another. So the governments of the States would occupy a role clearly and definitely subordinate to that of the authority of the union.[7]

[7] See 'The Debates in the Federal Convention of 1787 which framed

Hamilton's undue emphasis upon the necessity of a strong central government did not however appeal to the other members of the Convention. He was practically the only member who advocated such a centralised union and such a subordination of the governments of the States to the authority of the union. We should, therefore, leave him alone and proceed to consider the other two points of view upon the basis of which the debates and discussions in the Convention were carried on for about four months. One of these two points of view found expression in what has come to be known as the Virginia plan of union, which was introduced in the Convention by Edmund Randolph. This plan may be roughly said to be the scheme which the larger States had contemplated and which they would have embodied in the constitution if they were the only units of the federation. The smaller States, however, took objection to this plan and proposed a scheme of union of their own. This has been known as the New Jersey plan and was introduced in the Convention by William Paterson of New Jersey.

The fundamental differences between the two schemes were brought out into clear relief in the Convention itself by James Wilson of Pennsylvania. So the points of view accommodated in the two schemes and the differences between them may

the constitution of the United States of America, Reported by James Madison '—Edited by G. Hunt and J. B. Scott (1920), pp. 119-20.

be explained at once by giving a short summary of his speech on this occasion. Mr. Wilson contrasted the points of view contained in the two documents as follows :

1. The central legislature provided for in the Virginia plan was bicameral while in the New Jersey scheme it was unicameral in structure.

2. Representation of the people at large was the basis of the first scheme while the state legislatures were 'the pillars' of the second.

3. Proportional representation was advocated in the first, while equality of suffrage was the demand of the second.

4. The Virginia plan contained the proposal of vesting only enumerated powers in the States and the residuary powers in the central government. The New Jersey plan provided for the grant of only a few powers to the central legislature in addition to those which the confederate Congress happened to exercise at the moment and vested in the legislatures of the States the residuary duties.

5. The Virginia plan provided for a power of veto on the part of the central government over the measures passed by the legislatures of the States. The New Jersey scheme awarded no such veto power to the central government. Instead it would have power of coercion in case any of the States turned out to be rebellious.

6. In the first scheme it was the majority of the people of the United States whose opinions would prevail in the national government. In the second the opinions of the minority might prevail over those of the majority in some cases.[8]

The summary of the two plans as set forth above makes it clear that neither the protagonists of the one nor those of the other had any intention to do away with the States as separate local entities. The advocates of the Virginia plan were as unwilling to destroy the identity of the States and merge them completely in the union as the originators and supporters of the New Jersey scheme. But while both the groups wanted to maintain the States as separate entities, their ideas differed in respect of the relations in which the States were to stand to the union. Mr. Madison and his colleagues placed their emphasis largely on the sovereignty of the new union and would have the States working only for local purposes within its bosom. Mr. Paterson and his associates on the other hand placed their emphasis on the sovereignty of the individual States and would have the union only for the discharge of the common functions of these sovereign States on a common basis.

Now as in the Virginia plan the nation-idea was emphasised, it was proposed in this document that the organs of the national government would represent not the States as such but the people of

[8] *Ibid.*, p. 107.

the union as a whole. Consequently in both the houses of the bicameral legislature of the central government, the people of the different States were to be represented in proportion to their numerical strength. The framers of the New Jersey scheme, however, demurred to this view. They would regard the organs of the central government as representing the thirteen sovereign communities which would make up the union. In consequence of this standpoint they were of opinion that the national legislature which should be unicameral in structure must equally represent these sovereign communities, no matter that some of them were large and some small. To emphasise further that the union was an association of thirteen sovereign communities and that the legislature of this union consisted only of the delegates of these sovereign bodies, it was proposed that the members of this central legislature should be elected by the legislatures of the States.

There was of course one other reason why the promoters of the New Jersey plan wanted equal representation in the federal legislature. Apart from the fact that this would emphasise the sovereign character of the States, it would also help in the protection of the interests of the small States. The delegates of these States to the Federal Convention were consistently under the apprehension that if the national legislature was constituted on a proportional basis, the larger

States which would have the greater share of the representation would have everything in their own way and the interests of the small States would suffer in consequence. Mr. Madison and his colleagues did their best of course to allay this apprehension by pointing out that it was most unlikely that in the national legislature the interests of the small States would ever be found to be antagonistic to the interests of the large States. They were never likely in fact to be in conflict with each other. States might divide on an economic basis. They were unlikely, however, to divide on the basis of their numerical strength. All the same the delegates of the small States continued to harp on the equality of representation and this on the dual ground that it would protect the interests of the small States against the aggression of the large States and that it would emphasise the sovereign character of the units of the federation.

This deadlock was broken by a compromise which neither group liked very much but which each group was constrained to accept. Those who sponsored it pointed out that there could be reconciliation between the two groups only on the basis of such a compromise. Dr. Johnson who was a delegate from the State of Connecticut was the originator of this compromise plan.[9] He suggested

[9] The plan was known as the 'Connecticut Compromise.' This was because of the important part played by the Connecticut delegates

that the principles of representation advocated by the large and small States 'ought to be combined,' 'instead of being opposed to each other.' "In one branch the people ought to be represented; in the other States." This suggestion of Dr. Johnson was supported by Mr. Oliver Ellsworth of the same State. "We were partly national, partly federal," he observed. "The proportional representation in the first branch was conformable to the national principle and would secure the large States against the small. An equality of voices was conformable to the federal principle and was necessary to secure the small States against the large."[10] So it was proposed and accepted that the national legislature should consist of two houses—in the first the people of the States would be represented directly and in proportion to their numerical strength and in the second the States as such would be represented and this on a basis of equality. The lower house would be the house of the nation and the upper house would be the house of the States. The first would emphasise the idea of the union, the second that of the sovereignty of the States. In order that this latter idea might be brought out into clear relief it was proposed (and the proposal was accepted) that not only the States would be equally represented

in this regard. But it would be going too far to regard it as originating with Connecticut delegates. See Farrand—*op. cit.*, pp. 106-07.

10 Hunt and Scott—*op. cit.*, pp. 182-83, 189.

in the upper house of the national legislature but that the representatives would be elected by the legislatures of the States.[11]

Just as a compromise was effected between the two schools of thought in respect of the constitution of the national legislature, so also a compromise was brought about in respect of the division of powers between the central and State governments and the other relations between them. Madison and his associates had to abandon the standpoint that the national government should enjoy general powers and the governments of the States only enumerated functions. The position had to be reversed. They had to agree to the conferment of only specified and enumerated powers upon the central government. So it may appear that this arrangement was not really a compromise but a definite surrender to the New Jersey school. But if we probe into the matter more deeply, we shall find that it was not really a surrender. It also was a compromise. The Virginia plan had provided no doubt that the national government would have jurisdiction over all those powers which it would not be competent for the State governments to exercise. But simply because the central authority was being awarded the residuary functions, it was not to be assumed that government by the centre would be the rule and that by the States as such would be only an

11 It was by XVII Amendment of the Constitution in 1913 that direct election of the Senators was resorted to.

exception. There was a general understanding among all the delegates as to which powers were to be assigned to the central government and which to the governments of the units. In fact the division had been marked out more or less clearly by the traditions of British Imperial administration in the colonies and by the practice during the years of the Confederation. The powers which the British Imperial Government had reserved for itself in the colonies and the powers which the central government had enjoyed after the adoption of the Articles of Confederation were certainly the powers which the central government in the new regime would also enjoy and exercise. Further the experiences of the last few years had warranted that some powers in respect of the regulation of international and inter-state trade and commerce and in respect of taxation would be required to be handed over to the central government. But beyond these, all authority would remain vested in the State governments.

So the promoters of the Virginia Plan did not surrender absolutely to the New Jersey school when they agreed to have enumerated powers for the federal government. The question may be asked as to why they had insisted at first on the conferment of general powers upon the central authority. This they evidently did in order to counteract the traditions of central weakness and state omnipotence in the country. In case the

central government had only enumerated powers, it was not likely that the people would have at once a different view of the new central government. Consequently the old tradition might not be easily counteracted. But if general powers were conferred upon the central government and the States were left only enumerated powers, however large these latter might be, the people would immediately develop a new respect for the central government and the State governments also would no longer have any pretensions as to their superiority. As a result of the compromise the central government would not have the advantage of this psychological effect.[12] But otherwise the powers which were conferred upon this government were not lesser than those which might have been left to the central government if the Virginia Plan was accepted and worked out.

It should be remembered that the protagonists of the Virginia Plan had suggested that the central government should have power of veto over legislative measures of the State governments. This they had suggested for reasons which were obvious at the time. During the period of the Confederation a tradition of the State governments snapping their fingers at the central authority and disregarding and disobeying its injunctions had grown to an alarming

[12] In fact simply because of the residuary jurisdiction being left to the States, they continued to regard themselves as sovereign bodies and the central government only as their agent till the Civil War.

degree. It was thought by Madison and his colleagues that unless the central government had the right to veto the legislative decisions of the State governments, the latter might encroach upon the jurisdiction of the former. The advocates of the New Jersey plan admitted this apprehension to a great extent and had no doubt about it that the central government must have some weapon at its disposal to ward off such attacks upon its sphere of authority. The weapon which it proposed to place at its disposal was one of physical coercion. If a State encroached upon the province of the central government, it might be coerced by force to withdraw from the forbidden territory. Those who advocated this arrangement of course knew it for certain that forcible coercion was a weapon which could be wielded only in the last extremity. It could be used only on rare and extreme occasions. Possibly it was because of this that the promoters of the New Jersey scheme advocated it. They knew fully well that such had become the tradition in the country that unless the central government had some weapon in its hands, the governments of the States would certainly try to exercise authority and power at its expense. But they did not want to confer upon the central government any weapon which might be easily and normally used and which might constantly hang over the head of the governments of the States like a sword of Damocles. The power of veto which was proposed

in the Virginia Plan was a weapon of this character. Mr. Paterson and his supporters, therefore, rejected it and agreed only to place the instrument of forcible coercion in the hands of the federal government, an instrument which could be utilised only very rarely.

Now the compromise which was effected between these two standpoints amounted to a rejection of both the arrangements proposed. Neither the power of veto nor the power of forcible coercion was accepted. Instead the principle was adopted that the federal government would be supreme within the jurisdiction which was being conferred upon it and would act directly upon the citizens of the different States in regard to the powers and functions which were within the ambit of its authority. Of course those who were the protagonists of the sovereignty of the States shook their head in opposition. They still took it that the Union was a union of sovereign States and consequently it was imperative that the central government would act through the governments of the States. But this standpoint was thrown overboard and the principle was adopted that the federal government would have direct relations with the citizens of the States. In case any of the laws passed by the central legislature was disobeyed by them and in case they neglected to act up to the other measures adopted by the central government, it would have the right to

punish the law-breakers at once by its own authority. So without the necessity of coercing the States as such, the central government would have the means of making its jurisdiction respected.

Secondly another method was resorted to in order that the governments of the States might find it out of the question to encroach upon the jurisdiction of the central government. The Convention accepted the principle that the constitution which was being framed and the laws and treaties of the United States which would be made under that constitution must be regarded as the supreme law of the land and the legislative, executive and judicial functionaries of the States as well as of the federation would be bound by oath to support this constitution.[13] In case a state legislature passed a law which was inconsistent with any provision of the constitution or any law or treaty made by the central government under the authority of this constitution, it would not be regarded by the judges as a law at all. The encroachment of the governments of the States upon the jurisdiction of the federal government would in other words be *ultra vires* the constitution and consequently out of the question.

The constitution framed by the Federal Convention in 1787 was submitted to the Confederate Congress which adopted it without a dissentient

[13] Embodied in Article VI of the Constitution.

vote and then transmitted it to the legislatures of the States so that it might be placed before State Conventions for approval or rejection. Gradually one by one such State Conventions met, discussed and approved of the constitution, until eleven States signified their approval by July. 1788. Only North Carolina and Rhode Island held out. They came into the Union after it had already been launched in March, 1789. It should be noted in this connection that New York was a doubtful State. Its attitude towards the new constitution could not be definitely fathomed. So all efforts were made by the federalists to win it over. The most important contribution to federalist victory in this State was made by Alexander Hamilton, James Madison and John Jay by the publication of a number of illuminating papers which explained and interpreted the provisions of the new constitution. These papers were later embodied in the famous book, the *Federalist*.

As it has been emphasised already, both the nationalist and the separatist forces which swayed the mind of the people were accommodated in this constitution. The forces of nationalism became embodied in the government which was set up for the union and those of separatism were embodied in the governments of the individual States. They were to work independently in their own respective spheres. Neither the predominance of the separatist forces which some members of the Convention

had aimed at nor the predominance of the nationalist forces which others had in view was allowed to be achieved. It was the intention of the fathers that both should work side by side in the new system which was inaugurated. In case the sectional forces were allowed to predominate, the States would have continued as sovereign units and the union would have existed during their pleasure and in case the nationalist forces were allowed to predominate, the Union government would have become the sovereign and the States would have existed during its pleasure. Instead a system was discovered, in which the central government would be supreme within its own sphere and in which the individual States would be supreme within their own jurisdiction. This is certainly the greatest contribution made by the New World to the development of the science of government. The political unions of which there is record in history before the great experiment, which the Americans proceeded to make in 1789, were all of the nature of confederations, in which the units were sovereign entities and the central government existed only on sufferance. It was George Washington and his colleages of the Philadelphia Convention, who discovered the new light and showed the new way.

CHAPTER IV

The Federal System Set Up in 1789

The powers and functions which were delegated to the Central Government were enumerated mostly[1] in Section 8 of Article I of the Constitution. The items so enumerated make up a list surprisingly short. The Section provides that the Congress shall have power—

1. To lay and collect taxes, duties, imposts, and excises to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States;

2. To borrow money on the credit of the United States;

3. To regulate commerce with foreign nations, and among the several States, and with the Indian tribes;

4. To establish an uniform rule of naturalisation, and uniform laws on the subject of bankruptcies throughout the United States;

5. To coin money, regulate the value thereof, and of foreign coin, and fix the standard of wieghts and measures;

[1] Some powers have been conferred upon the Congress in other Articles as well. Section 3 of Article II and Section 3 of Article III, for instance, confer powers in respect of the law of treason and the disposal of territory and other property.

6. To provide for the punishment of counterfeiting the securities and current coin of the United States;

7. To establish post-offices and post-roads;

8. To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

9. To constitute tribunals inferior to the Supreme Court;

10. To define and punish piracies and felonies committed on the high seas, and offences against the law of nations;

11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

12. To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

13. To provide and maintain a navy;

14. To make rules for the government and regulation of the land and naval forces;

15. To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;

16. To provide for organising, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively, the appointment of the officers, and

the authority of training the militia according to the discipline prescribed by Congress;

17. To exercise exclusive legislation, in all cases whatsoever, over such district (not exceeding the ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States; and to exercise like authority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings ; and

18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

It is significant that the functions enumerated above contain no reference to certain subjects. There is no mention for instance of criminal law, of agriculture, of education, of banking and insurance, of regulating and controlling corporations, of opening and maintaining roads other than post-roads, and of regulating intra-state commerce. Most of these subjects will come in for discussion in one way or another in later stages of this work. It is not irrelevant, therefore, to mention it here that none of them were included in the list of functions delegated to the

Central Government in 1789. It is no doubt important to emphasise the fact that in the first place the Congress was authorised to lay and collect taxes not only for certain specific functions but also for "the general welfare of the United States," and secondly that the Congress would not only have authority to exercise the powers specifically mentioned one by one in Section 8 of Article I but would also have power to make laws which might be deemed "necessary and proper" for carrying into execution the specific powers conferred upon the Federal Government. We shall deal with the significance of the inclusion these "general welfare" and "necessary and proper" clauses in due course.

But all the same it cannot be said that the great importance which the fathers attached to the new Central Government was brought out into relief by the eighteen items of power which were delegated to the Congress. Today those who will proceed to create a central authority on such a basis will not appear as serious people meaning business. But in 1787-88 the architects of the American federal system could certainly be regarded as wise and practical statesmen. It is true that as they were neither unduly influenced by the forces of state particularism, so also they were not unpractically swayed by the ideal of nationalism. But still they set up a central government which was not too weak and power-

less. About four decades later the great French publicist, Alexis Tocqueville, noted no doubt in his observations on the American democracy that the Central Government was only one department of foreign affairs, and that while the State Government was the rule, the Central Government was only an exception.[2] This remark might create the impression that only a very small portion of public authority was vested in the Central Government, the residue being in the hands of the Governments of the States. This is, however, not exactly a correct estimate of the balance of power set up in 1789.

When the Constitution was fashioned in the late eighteenth century, public administration in America was a very simple affair and it continued to be similarly simple for decades to come. In some States, as it has been pointed out in a previous chapter, the people had become increasingly industrial no doubt. But it should be borne in mind that the industries were then run all on a small scale. In other States again the people depended almost exclusively upon agriculture. Civilisation was thus mainly rural and on that account very simple and straightforward. Problems of government could not on that account become intricate and complex. The lesser the relations are between man and man, the lesser

[2] Democracy in America (Translated by Henry Reeve), New Edition (1875), Vol. 1, p 52.

is the necessity of the intervention of the government. The prevalent political theory in the American States was also stoutly and emphatically individualistic. People were definitely of opinion that democracy not only consisted in the administration of public affairs by persons elected by, and responsible to, the general body of the people, but that it presupposed also that the people should depend as little as possible upon even a government of this character.

People of the United States were in fact believers more in private initiative than in public enterprise. They also believed it to be true that the greater the powers and functions of a government, the more tyrannical would it tend to become even if it continued to be democratic in form and structure. In view of this opinion held so generally by the people, public administration could not be overloaded. The government was to maintain peace at home and ward off attack from without. Beyond this it should have very little to do. So it turned out that if the Central Government was invested with only a few functions of public administration, the Governments of the States had not many more to be concerned with. Administration on both sides was rather simple and limited in scope. It is true that while the Constitution defined the powers and functions of the Central Government, it left the rest of the field of public authority to

the States. But this 'rest of the field,' though theoretically unlimited, was actually almost as narrow as the province of the Central Government itself.

Now whatever might be the number of functions and the amount of power entrusted to the Central Government or left to the Governments of the States by the Constitution of 1789, it was the essence of the system established by it that the two governments should work in complete independence of each other. Both were to be regarded as the agents of the sovereign people. Both derived their powers and authority from them and both were to act upon them directly. The mediatory character which the State Governments had possessed during the period of the Confederation was now done away with and the Central Government was given direct and immediate association with the people of the different States. So when the central government would require money, it would no longer make any requisition upon the Governments of the States. It would proceed to pass a taxation measure (allowed by the Constitution) and this measure would be at once binding upon the people of the Union. Similarly in other fields reserved by the Constitution for the Central Government, it would have the liberty to make laws which also would be immediately binding upon the people. The Governments of the States would have no say in these matters.

So the people of the United States would live simultaneously under two governments. They would be subject to the jurisdiction of the Governments of their respective States in regard to matters which were left to them by the Constitution, and they would be subject to the authority of the Central Government in regard to matters which were vested in it by the same Constitution. They must owe allegiance at one and the same time to two governmets. A citizen would have a double duty and double privilege. In fact he would have a double citizenship. As an inhabitant of a State he would have his duties to the State Government and would also have his corresponding privileges under the same. As an inhabitant of the Union again he would have his duties to the Central Government and would also have his corresponding privileges under it.

That the citizenship was dual in character was brought out very clearly in two judgments of the Supreme Court of the United States. In 1857 in what is known as the Dred Scott case,[3] Chief Justice Taney in delivering the opinion of the Court observed: "We must not confound the rights of citizenship which a State may confer within its own limits and the rights of citizenship as a member of the

3 **Dred Scott v. John F. A. Sandford, 19 Howard 393.**

Union. It does not by any means follow, because he has all the rights and privileges of a citizen of a State that he must be a citizen of the United States." In the 14th Amendment to the Constitution which was passed after the Civil War, the citizenship of the United States and that of a particular State were defined afresh (in Section 1). "All persons born or naturalised in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." Now the interpretation which the Supreme Court of the United States put upon this provision of the XIVth Amendment in 1873 in what have been known as the Slaughter House Cases[4] confirmed the fact that the citizenship was dual. Justice Miller in delivering the opinion of the Court in these cases pointed out that while for the citizenship of the United States birth or naturalisation was enough, for the citizenship of a State residence there was necessary. "It is quite clear, then," he observed, "that there is a citizenship of the United States and a citizenship of a State, which are distinct from each other and which depend upon different characteristics or circumstances of the individual."

So we may repeat that the two governments would work side by side but in their own

[4] 16 Wallace 36.

spheres in the United States. Not that their ultimate purpose was different. They were the agents of the same sovereign and each was to look after the welfare of this principal. But subject to this common end in view, their fields of work were different and they were to move and act unhampered by each other. The question would necessarily arise as to whether they would work completely and absolutely in their own way or whether they would act in some respects at least in co-operation and collaboration with each other. The supreme policy-framing machinery in the two governments must of course be necessarily different. Every State would have its government consisting of the legislative, executive and judicial branches. The Union would also similarly have its government consisting of the three branches of the Congress, the President and the Supreme Court. But whereas the policy-framing supreme organs of the two governments were to be separate and different, it was not necessary on principle that the subordinate executive and the subordinate judicial agencies of the two governments should also be separate and different. Co-operation in these fields might be possible without endangering the principle of dual government laid down by the Constitution. It might not have been out of the question in certain circumstances that the measures adopted by the

federal legislature would be given effect to by the executive head of the federation through the agency of the subordinate executive of the State Governments. Instead of both the Central and State Governments appointing and maintaining subordinate executive agents of their own, they might co-operate in maintaining one common agency in certain fields. This agency might be immediately under the control and discipline of the State Governments but on some financial conditions or on no conditions whatever it might also be required to take up the responsibility of carrying out certain orders of the supreme Central Executive.

This co-operation, however, was not thought possible by the Central Government. The traditions during the period of the Confederation were such that the new Central Government, mindful of its interest and responsibilites, could not welcome any such collaboration. So long as the Central Government was dependent upon the State Governments for the execution of its measures, the latter never showed sufficient respect for these measures and carried them out only tardily, if at all. It was in fact this disregard of the decisions of the Congress by the Governments of the States which made a mockery of the Confederation and reduced it to an absurdity. So it was thought when the new Central Government was organised that

unless it also was ready to be reduced to similar impotence, it must proceed to set up its own agency to carry out the policies which it might lay down from time to time. There were of course some offices to which the Central Government would have been required to appoint agents of its own in all events. The diplomatic and consular offices for instance would have been required to be filled by the Central Government. But possibly in some other fields collaboration might not have been out of the question. But the Federal Government from the start made it a principle that it must depend for the execution of its measures upon men appointed by itself alone and absolutely under its discipline and control. So just as there would be two governments working side by side, so there would be two agencies for carrying out their orders and measures in the country. One must not depend upon the other. The principle that each government would act directly upon the people was worked out to its logical extent.

If co-operation were possible in certain circumstances between the Federal and State Governments in regard to their administrative agencies, it was possible still more in regard to the organisation of the judiciary. This branch of government in order to discharge its proper functions ably and conscientiously requires to

be independent of the executive and legislative branches. Then if it could really act independently and conscientiously, it could be safely entrusted with the adjudication of federal as much as State disputes, no matter that it was maintained by the State Governments alone. Independent and impartial as it was, it would not dispose of cases in a way which might further the interests of the States and jeopardise those of the Union. It would be there only to mete out justice.

The fathers of the Constitution could not, however, take such a rosy view of the State courts in the United States. But still it was only after a great struggle both in the Convention and later in the Congress that the principle was accepted that the Federal Government would have a complete chain of inferior and superior courts of its own just as the Government of a State would have for its own purposes. In the Convention there was an unanimity of opinion with regard to the estalishment of a Supreme Court for the Union. But while in the Virginia Plan there was a provision not only for the establishment of a federal Supreme Court but also for setting up a number of inferior federal tribunals, in the New Jersey plan there was provision only for the creation of a supreme national tribunal. The "State-Rights" men did not encourage the establishment of

inferior federal courts. In fact they set their face definitely against this provision of the Virginia Scheme. John Rutledge of South Carolina led a vigorous assault upon this proposal. Every State, he observed, had a complete chain of courts of its own and these tribunals "might and ought to be left in all cases to decide in the first instance, the right of appeal to the supreme national tribunal being sufficient to secure the national rights and the uniformity of judgments." He considered that the establishment of inferior federal tribunals would only amount to "an unnecessary encroachment on the jurisdiction of the States."[5]

It was also argued in the Convention that not only would the establishment of inferior federal courts encroach upon the jurisdiction of the States but it would also entail an unnecessary expenditure which the Federal Government might easily avoid. The federalists were not of course impressed very much by these arguments. But they were defeated by a narrow majority. They had consequently to fall back upon their second line of defence against attack by the "State Rights" members. They had to resort to other tactics in order that their plan of setting up a complete chain of federal courts might not be at once thrown overboard. Madison and his associates proposed accordingly that while the Constitution need not establish inferior tribu-

[5] Hunt and Scott—*Op. cit.*

nals, it should not also prohibit their establishment at any time. It should confer discretionary authority upon the central legislature in this respect. If the Congress thought it right and proper, it might set up such tribunals by an act of its own. This proposal was accepted and on this basis a compromise was effected.

So when the national legislature was constituted in 1789, the fight over this issue was shifted on to its floor. Here at last the federalists secured their triumph. A Judiciary Act, drafted by Oliver Ellsworth, who had been a member of the Federal Convention and who later became Chief Justice of the Supreme Court, was passed, providing for the establishment of federal inferior courts. There were several arguments which had been used in this connection and which the opponents of the Bill in that form could not satisfactorily answer. In the first place Madison pointed out that in many States the judges could not be independent at all. They were on the contrary absolutely dependent upon the State legislatures. Their conditions of service would preclude them from issuing any judgment which might adversely affect the interests of the States. "To make federal laws dependent on them," he observed, "would throw us back into all the embarrassments that characterised our former situation." In fact, he remarked, to make a transfer of the federal jurisdiction to the State courts would neither be compatible with the basic

principles of the Constitution nor safe to the federal interests. The lack of independence on the part of the State courts was mainly responsible for the intransigence of the federalists on this issue. As these courts were not independent, they could not certainly be impartial in the administration of justice.

Actually after the War of Independence the State courts, dependent upon the State legislatures, dealt with litigants from other States and from foreign countries so unjustly and so capriciously that friction between individual States and between the United States and foreign countries became inevitable. The sense of security necessary for commercial intercourse became absolutely undermined. Now if this situation was to improve, if the sense of security was to be revived, one thing essential to be done at this time was to establish a system of national courts.

Trade again demanded not only dependable courts but also dependable laws. It was recognised by all classes of people that there was a great need for a body of laws applicable throughout the nation. "From this recognition it was an easy step to entrust the development of such law to a distinctive system of courts, administering the same doctrines, following the same procedure and subject to the same nationalist influence." In other words a chain of inferior and superior federal courts was necessary in order that a common body

of laws so indispensable for the growth of trade and commerce might gradually develop in its hands.

Lastly it was argued that as the Federal Government had been empowered to approach the citizens direct to secure ways and means, it was but necessary and proper that it should have a machinery of its own to enforce these claims. The new Federal Government would no longer make any requisitions upon the Governments of of the States. It would impose taxes upon the people on its own initiative and collect them through its own agency. Now if some people defaulted to pay their dues, the Government should have an opportunity of bringing them to book through its own judicial machinery. It must not depend upon the goodwill of the State courts for the enforcement of its claims.[6]

Another idea must have been at work at the back of the mind of the architects of the new Union when they decided in favour of setting up a separate chain of federal courts and also when they organised separate administrative agencies for the Federal Government in all fields of federal activity. This was the idea of accustoming the people to the existence of the new Central Government.

[6] Felix Frankfurter and James M. Landis—The Business of the Supreme Court : A Study in the Federal Judicial System (1927), pp. 7-11. Professor Frankfurter is now an Associate Justice of the United States Supreme Court.

The people in all the States had been accustomed so long only to their State Government. They had no direct association with the Government of the Confederation. The organ of the latter worked through the mediation of the State Governments. It was now to be brought home to the people that the old order had changed and a new system was at work. The government is not an abstract thing. The people would not feel that a central government existed unless they had opportunity of being brought into touch with it. They would not appreciate its strength unless they were brought face to face with its administrative and judicial agents. If they continued to find that the postmasters with whom they dealt, the tax-gatherers whom they dreaded and tried to avoid, and the judges whose courts they had to attend to receive either punishment for offences which they had committed or compensation for wrongs which they had suffered, were all officers of the State Governments, certainly they would not feel the change which had been brought about in the system of government in the country. To them only one government would remain manifest and that the State Government. The Federal Government would remain something abstract and on that account weak and fragile. The State Governments would continue to engross the attention of the people and would, therefore, exclusively command their allegiance as well. The Federal Gov-

ernment would not be manifest to them and consequently would not enlist their loyalty and support. So it might have been thought necessary that throughout the Union there should be officers, judicial and administrative, who would be appointed by the Federal Government and who would appear before the people as the manifestation of power and authority of this Government. Just as the State Governments had a complete chain of courts of their own extending from the justices of the peace to the superior courts, so the Union also would have a complete judicial organisation of its own including the district courts, the circuit courts and the Supreme Court.

Section 2 of Article III of the Constitution provides for the extent of judicial power of the United States. It shall extend, the Section lays down, "to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States, between a State and the citizens of another State,[7] between citizens of different States, between

[7] XI Amendment of the Constitution deprived the United States of judicial power in regard to "any suit in law or equity, commenced or

citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign states, and citizens, or subjects." Of these cases again those which would affect ambassadors, other public ministers, and consuls and those in which a State would be a party would be subjects of original jurisdiction of the Supreme Court. In other cases the Supreme Court would have appellate jurisdiction both as to law and fact. But this appellate jurisdiction of the United States Supreme Court would be subject to such exceptions and such regulations as the Congress might choose to make from time to time.

Now the cases to which the judicial power of the United States extends under Section 2 of Article III and which have been enumerated in the previous paragraph were not all of them of exclusive jurisdiction for the federal courts. Some of them were certainly of this character. Those for instance in which the Supreme Court was given original jurisdiction could not be otherwise. But as regards the rest it was for the Congress to declare if they were to be matters of exclusive jurisdiction for the federal courts or not. If the Congress did not agree to set up the inferior federal courts, certainly these cases might have been tried in the first instance by the State Courts

prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign State."

and the Federal Supreme Court would have only appellate jurisdiction. Even when the inferior federal courts were set up, the Congress had the right to invest the courts of the States with jurisdiction over some or many of them. The State Governments, of course, might refuse to have such jurisdiction for their courts. But if the States did not make such a refusal, the Congress would have the liberty to invest the State courts with jurisdiction over some of these cases. In fact the courts of the Sates were allowed to dispose of many disputes, jurisdiction over which had been conferred by the Constitution upon the United States. It has been remarked by a very competent authority that "from 1789 to the Civil War the lower federal courts were, in the main, designed as protection to citizens litigating outside their own States and thereby exposed to the threatened prejudice of unfriendly tribunals. Barring admiralty jurisdiction, the federal courts were subsidiary courts."[8] So, as another writer[9] has put it, "the courts of the National Government are complementary to those of the States." The lines of demarcation between the two sets were largely blurred.

In the face of this confusion how were the apprehensions allayed that cases of federal jurisdiction, if left to the courts of the States, might

8 *Ibid.*, p. 64.

9 S. E. Baldwin—The American Judiciary, p. 152.

be disposed of by them in a way prejudicial to the interests of the Union? This was done by two methods. In the first place a case might be instituted by the plaintiff at his option either in a State court or in a court of the United States no doubt, but the defendant might, if he had no confidence in the State court, remove it for trial to the proper federal court. Secondly, if the decision of a State court went against a right claimed by a party under either the Constitution of the United States or any law or treaty of the United States made thereunder, the losing party would have the privilege first to appeal to a higher court of the State against the decision of the lower, and if, unable to secure its reversal there, to appeal to the Supreme Court of the United States.[10] So in the last resort it was for the Federal Supreme Court to see that the provisions of the Constitution and the laws and treaties made thereunder by the United States were not trampled under foot by the courts of the States. It should be known in this connection that if the State court upheld the right claimed by a party under the Constitution or laws and treaties made by the United States under it, then the losing party would not be entitled to appeal against this decision to the Supreme Court of the Union.

The Federal Government thus secured for itself in 1789 a complete system of courts which,

[10] Section 25 of the Judiciary Act of 1789.

however, shared their jurisdiction with the State courts. This arrangement was regarded as satisfying two needs at the same time. This was expected to guarantee the interests of the Union and was also likely to conciliate the States. There were many both in the Convention and later in the Congress, who, as we have seen already, were of opinion that the inferior federal courts would only rival the jurisdiction of the courts of the States and as such would be a danger to the interests of the latter. There were others, however, in both these assemblies who held the opposite view that unless the Federal Government was provided with a complete system of courts of its own, its strength would be undermined and its authority sapped by State courts exercising jurisdiction in the federal domain. The establishment of inferior federal courts under the Judiciary Act of 1789 meant a triumph for the former school. But the latter school of thought was conciliated partly at least by the jurisdiction, however limited, which was given to the State courts in federal subjects.

We may conclude this chapter by emphasising afresh the fact that the founding fathers set up a system of government in the United States in which sovereign authority was vested in the people of the Union and in which while some important items of power were specifically granted to the Central Government, the residuary powers including some other very important items were left in

the hands of the States.[11] The Federal and State Governments were to work side by side but independently of each other. In order that they might maintain their independent existence, it was arranged that both the Federal and State Governments would have their own executive and judicial paraphernalia.

11 It was not specifically stated in the Constitution until the Tenth Amendment was adopted in 1790 that the States would enjoy residuary powers.

CHAPTER V

Federalism and State Sovereignty

The basic differences between the constitution which was worked under the Articles of Confederation and that which was put into operation in 1789 have been brought out into relief in previous chapters. It may be repeated here that the Congress which was the only organ of the Confederation could not act directly upon the people of the States. It had to act through the medium of the State Governments. The Articles of Confederation again could not be changed in any particular without the unanimous assent of all the States. Each single State had in other words the right to hold up an amendment of the constitution. The Confederation was in fact only a league of sovereign communities.

Under the new Constitution, however, the position of the States in the Union was definitely altered. The Central Government was now empowered to act directly upon the people of the federal units. It was not to be dependent upon the State Governments for the enforcement of its laws and the collection of its revenues. Nor was it open any longer to any single State to hold up an amendment of the Constitution, which might appear as necessary and desirable to the other

members of the Union. Article V of the Constitution provided for the procedure according to which such an amendment might be adopted and enforced although one-fourth of the States might object to it and oppose it. These two facts are significant in this that they show rather clearly that the States were no longer sovereign communities.

The question then arises as to where this sovereignty was located in the new order of things. To-day such a question has become absolutely an idle one. But in the last century it was a fundamental one. Upon the answer to this question depended the attitude which the States were to adopt towards the Union and its Government. In fact the States became loyal or hostile to the exercise of jurisdiction by the Central Government according as they interpreted their own position in the Union as either sovereign or subordinate.

None but the ultimate authority in a State can be said to possess the attribute of sovereignty. But neither the Government of the Union or the Governments of the States could be said to be the ultimate authority. Such authority might really be said to be vested in those who adopted the Constitution and could change and modify it, if they so desired. "We, the people of the United States," so runs the preamble to the Constitution, "in order to form a more perfect union, establish justice, insure domestic

tranquillity, provide for common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America." So the people who "ordained and established" this Constitution could alone be regarded as sovereign.[1] Just as by following a particular procedure they adopted the Constitution and distributed through it the powers of government between the Central and State Governments on a particular basis, so also by acting according to the procedure laid down in Article V of the Constitution they might amend it, and, if they so chose, change not only the details but also the very basis of the distribution of powers between the two Governments. The Central Government might be supreme in 1789 in respect of the powers which were vested in it in that year by the Constitution. But in the year following, if the people so decided, this Constitution might be amended by them and some of the powers previously vested in the Central Government might be withdrawn from it. What again was true in regard to the position of the Central

[1] As it will be noticed soon, this theory had for long only few supporters. In *Chisholm v. Georgia* (1793), Justice Wilson, while pointing out that Georgia was not a sovereign State, was constrained to observe at the same time : "To the Constitution of the United States the term *sovereign* is totally unknown......Those who *ordained* and *established* the Constitution......might have announced themselves *sovereign* people of the United States. But serenely conscious of the *fact*, they avoided *ostentatious declaration.*"

Government was also true in regard to the position of the States whose jurisdiction also might be similarly curtailed if the people thought necessary. In view of this mutability of position of the two Governments, none of them could be called sovereign. It was the people of the Union who could determine the position of both and as such were sovereign.

In fact both the Central and the State Governments were subordinate authorities, enjoying and exercising only those powers which the people, the ultimate sovereign, either delegated to them or left to them according as they thought discreet and proper. Both derived their jurisdiction from the Constitution as it stood at a particular time. Both enjoyed supreme authority within the four corners of this jurisdiction for the time being. But the Constitution might be changed and along with it might be changed the jurisdictions within which the two Governments were supreme. Such jurisdictions might suffer diminution or gain extension. But anyhow they might not be as they had been. Both the Governments might consequently be regarded as the agents of the sovereign people whose decision as to their respective powers and functions was embodied in the Constitution.

In creating a balance of power between the Central Goverment and the Governments of the States, the people of the Union handed over some

specific functions to the Central Government to be carried out on a common and central basis, while they left the residue of public authority in the hands of the States to be exercised by their Governments on a local and separate basis. Now it might appear to some that as the powers of the Central Government were enumerated and those of the States were general and residuary,[2] the position of the latter must be different and distinct from that of the former. But this point of view does not stand scrutiny. In view of the fact that both the Governments were to enjoy only those powers which the people might for the time being vest in them, there could be no doubt about this that both enjoyed only delegated powers. It was only because of the exigencies of the situation and for the sake of convenience that the powers vested in the Central Gevernment were enumerated in the Constitution and those vested in the Governments of the States were not. Otherwise the nature of their authority was the same. Both the Governments were mere agents of, and stood in the same relation to, their common Principal, the people of the Union.

But although as a result of an analysis of the nature of the Union, the people of this entity

[2] The Constitution which went into effect in 1789 did not provide for it explicitly that the States were to enjoy residuary jurisdiction. It was provided for only implicitly. But the Tenth Amendment adopted in 1790 made it explicit.

alone are found to possess the attribute of sovereignty, still for decades this was not acknowledged in the United States of America. There were many people who, even after the inauguration of the new Constitution, believed that the States were sovereign bodies. The adoption of the Tenth Amendment of the Constitution[3] which made it absolutely clear that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," lent strength to their point of view. But for nearly four decades this opinion could not be widespread. It was no doubt cherished by a small section of the people and at times, as we shall soon see, attempts were made to give effect to this point of view. But until the doctrine of nullification was enunciated by Calhoun in the late twenties of the last century, the idea that the States were still sovereign was confined only to the extreme 'State-rights' people. From about 1830 to the close of the Civil War, however, it was not only entertained on a far larger scale but it even threatened to overwhelm and smother the idea that the sovereignty was vested in the people of the Union or even that it was divided between the Central and the State Governments. It was only when the North triumphed over the South in

3 In 1790.

the Civil War that the doctrine of State sovereignty was definitely buried and the opinion that such sovereignty was located in the people of the Union gained ground.

Between 1789 when the federation was launched and 1828 when Calhoun enunciated his doctrine of nullification, the theory of divided sovereignty was in the ascendant. The people of the United States happened to believe as a rule during this period that while in the old regime sovereignty was vested in the States alone, in the new regime it was divided between the States and the Union. In 1792, the Supreme Court of the United States made itself the exponent of this theory in a famous case, *Chisholm v. Georgia*. The Court declared: "The United States are sovereign as to all powers of government actually surrendered. Each State in the Union is sovereign as to all the powers reserved." [4]

The doctrine of divided sovereignty enunciated so clearly by the Supreme Court had, as it has been pointed out, the approval of most people in the Union from 1789 till the emergence of Calhoun as the champion of State rights. This is of course not to mean that all people were reconciled to the delicate balance of power created by the federal constitution between the Central and State authorities. From time to time there

[4] 2 *Dallas* 419.

were sectional movements in different parts of the Union which, though ineffective by themselves, became certainly precedents of the final sectional movement culminating in the Civil War. In the ensuing chapters we shall see how the Central Government, created in 1789, did not remain as it was constituted in that year. It gained in both stature and authority as years passed by. The sectional movements, however, were not precluded by the increase of authority on the part of the Central Government. On the contrary it seems that because this Government was consciously or unconsciously assuming wider jurisdiction, the sectional forces also became more active and vigorous. In fact although most people accepted the principle of divided sovereignty, yet the idea that sovereignty was located in the individual States was not only not dead but it was emphasised from time to time in a most inconvenient manner. This feeling of separatism was strengthened increasingly by some of the steps which the different organs of the Central Government were constrained to take from time to time.

The famous case, *Chisholm v. Georgia*, has already been referred to. A suit was instituted against the State of Georgia by a citizen of another State and thereupon the Supreme Court issued summons against Georgia. The latter made a written protest against the Court taking

jurisdiction of the cause on the ground that a State which was even partially sovereign could not be sued by a citizen of another State. The Court, however, refused to accept that plea as valid and proceeded to deal with the case although the State of Georgia did not take any part in the proceedings. Under Section 2 of Article III of the Constitution judicial power of the United States extended to controversies "between a State and citizens of another State." So the Court naturally thought that it would not be justified in refusing to entertain the case on the ground of want of jurisdiction. But such entertainment on its part roused the feeling of State particularism to white heat. People began to place all the emphasis on the sovereignty of the States and argued that such sovereignty was being undermined as a result of the attitude which the Supreme Court had taken up. So State particularism which was dormant for some time became active again and the assertion of its strength was proved by the fact that an amendment to the Constitution was adopted so as to provide that judicial power of the United States would not extend to any suit instituted against any of the States by citizens of another State or by the citizens or subjects of any foreign state.

The passing of the Alien and Sedition Laws by the central legislature in 1798 supplied another occasion for the release of particularist forces in

the Union. They had been adopted to meet the situation in the country created by the Napoleonic Wars. The United States was maintaining neutrality which it became increasingly hard to preserve. People were definitely divided into two groups, one ardently sympathising with France and the other with Great Britain. The latter, the Federalists, who were now in a majority regarded themselves to be in danger at the hands of their local opponents. They were accordingly responsible for the passing of these measures. The Alien Act empowered the President to expel foreigners by executive decree. This was aimed at the innumerable Frenchmen and other people of revolutionary ideals, who were living in the country without being naturalised and who were a source of strength to the Republicans and a source of anxiety and concern to the Federalists. The Sedition Act gave statutory authority to the courts to take cognizance of conspiracies against the Government or of libels againsts high officials. It also provided that when a speech would be made or an article would be written against either the President or Congress to bring them into contempt, such an action would be declared a misdemeanour punishable by fine or imprisonment.

These measures which were aimed at the political opponents of the party in power roused to fever heat the feeling of opposition of the Republicans in all the States. Jefferson and Madison who

were the two outstanding leaders of the Republican Party and who were looking on with increasing anxiety and concern at the assumption of new power and responsibility by the Central Government thought it right and proper that the passing of the Alien and Sedition laws should be made an occasion for a vigorous protest on the part of the States against this tendency. They were the champions of the agrarian civilisation of the Southern States and were watching with apprehension the extension of the commercial and money power of the North. They were convinced that the gradual growth of central authority would only result in the further extension of the industrial and commercial civilisation at the expense of the agrarianism of the South. So if such extension was to be stopped, it was essential in their eyes that further growth of central authority should be stopped as well. Accordingly, at their instance the legislatures of the States of Virginia and Kentucky passed resolutions of protest in the closing months of 1798 against the Alien and Sedition Laws. "The Virginia Resolves" were drafted by Madison and those of Kentucky by Jefferson.

In both the Resolves the theory of compact was emphasised. The federation was the result of a compact among the States. They agreed to hand over some powers to the Central Government. Now in case this Government exceeded the limits of powers thus granted, its actions to that extent

must be illegal. The Virginia Assembly declared that when by exceeding the limits of its delegated jurisdiction the central legislature made itself responsible for the passing of any illegal Act, the contracting States "have the right and are in duty bound to interpose for arresting the progress of the evil, and for maintaining within their respective limits the authorities, rights, and liberties appertaining to them." The Resolutions adopted by the legislature of Kentucky emphasised the fact that those acts of the Central Government which it undertook beyond its delegated powers were "unauthoritative, void, and of no force."

The question was as to who would declare them to be void and of no force. It is not exactly clear from the language of the Resolves if it was open to one single State to declare an act of the Central Government as unconstitutional and therefore void or whether it was for the different States to declare it together. Of course when the resolutions passed by the Kentucky legislature had been published and had the advantage of criticism in other States, a second series of Resolutions also drafted by Jefferson was adopted by this body. In this second series it was laid down that "every State has the right . . . to nullify by their own authority all assumptions of power." This might mean that every individual State was to judge for itself if an act of the central legislature was unconstitutional

and should be declared as nullified within its borders on that account.

However vague on this one point the Resolves of 1798 (and 1799) might be, there was no doubt about it that their adoption by two States gave a stimulus to the re-assertion of the idea of State sovereignty and to the popularisation of the theory of compact. In 1798 it was the Republicans who were responsible for supplying this stimulus. But time was not distant when the Federalists would be the inspiring agents in this regard. The purchase of the Louisiana territory by Jefferson in 1803 supplied the occasion for the Federalists to adopt themselves the attitude which they had condemned in the Republicans sometime back. The annexation of this territory upset the balance of power between the North and the South. It was taken for granted that the States which would be formed out of this territory would have the same outlook and opinions as Virginia. The States of New England became consequently perturbed. They now propounded the theory that as the annexation of Louisiana upset the balance of power within the Union, it absolved them from all allegiance to it. This was a breach of the compact under which they had entered the Union. So they might now go out of it if they so desired. Actually for a time people in the New England States toyed with the idea of seceding from the Union and constituting a new confederacy of their own.

The policy of impressment on American vessels which the British Government was pursuing vigorously, had created bad blood between Great Britain and the United States. Efforts of conciliation proved abortive. Under the inspiration of Jefferson the United States Congress then passed the Embargo Act in December 1807. This Act, which immediately went into effect, put an interdict on all intercourse with Great Britain. Jefferson had expected that as a result of the operation of this measure England would be brought to its knees. Actually, however, those who suffered most were not the people of this country but the people of the New England States of America. The shipowners of these States were ruined in most cases. Otherwise also economic distress became widespread in New England and New York. Naturally the people in these areas did their best to circumvent the law in every possible way and to relax the rigour of the distress by the violation of the embargo. The Government, however, was on the alert. The Congress was persuaded to pass a law known as the "Force Act," which empowered the federal officials to seize goods without warrant if they suspected that the articles were intended for export.

The passing of this Force Act was the occasion for the New England States to emulate the example of Virginia and Kentucky and declare the right of the States to turn down a federal law if they

thought that the federal legislature in enacting this law had overstepped the boundary of its own jurisdiction. Actually the legislature of Massachusetts resolved that the Force Act was "unjust, oppressive, unconstitutional and not legally binding upon the people of this State." The legislature of Connecticut also passed a resolution to the effect that whenever the national legislature overleaped the limits of its prescribed jurisdiction, it was the duty of the State legislatures "to interpose their protecting shield between the right and liberty of the people and the assumed power of the General Government."

The separatist ideas thus set forth on account of the commercial embargo and the subsequent Force Act continued to be harboured in the mind of the New England people for some years to come. The war which was fought by the United States against Great Britain from 1812 to 1815 gave a stimulus to the movement of separatism. It was an unpopular war so far at least as the Federalists were concerned and it was the Federalists who were in a majority in the New England States. The latter not only refused to co-operate otherwise with the Federal Government in the conduct of the war but some of them even went to the length of refusing to supply the militia when requisitioned. Clause 15 of Section 8 of Article I of the Constitution lays down that the Congress shall have power "to provide for calling forth the militia to execute

the laws of the Union, suppress insurrections and repel invasions." Section 2 of Article II of the Constitution further lays down that the President "shall be Commander-in-chief of the army and navy of the United States and of the militia of the several States, when called into the actual service of the United States." But although during this war the President, duly authorised by the Congress, called the militia of the several States into the service of the United States to repel invasion, the Governors of Massachusetts, Rhode Island and Connecticut disregarded the President's requisition. They pointed out that under the Constitution the militia could no doubt be called into the service of the United States for the purpose of repelling invasion ; but the question was as to who was to judge that the exigency of invasion had arisen or not. The Governors thought that it was for them to judge if there was at all any risk of invasion.

The separatist attitude thus shown in connection with the supply of the militia was brought out into still clearer relief when in October, 1814, the legislature of Massachusetts summoned a New England Convention at Hartford for the purpose of discussing their grievances and considering the proposal of calling a wider Convention for revising the Constitution of the United States. The idea had gained

ground that as a result of the annexation of Louisiana the old balance of power had been affected to the detriment of the New England States and it was time that the people of these States should either take advantage of the breach of contract which the Louisiana purchase involved and go out of the Union or do someting at once for modifying the constitutional arrangement under which they might live within the Union. The Convention met in December, 1814. In regard to the question of secession it took rather a moderate attitude and discouraged the move. But although the Convention did not propose anything startling and dramatic, still it was more or less in the same frame of mind as the legislatures of Kentucky and Virginia had happened to be in 1798 and as the legislatures of Massachusetts and Connecticut in 1809. It adopted a resolution to the effect that in case the Conscription Bill which was before the Congress at the time was at all passed into law, it would be the duty and obligation of the New England States to nullify the measure.

We have seen in the above paragraphs that the growth of separatist opinion and the emphasis on State sovereignty was not the special characteristic of either the South or the North. Each became separatist and particularist alternately and at convenience. In 1798-99 it was the Southern States of Virginia and Kentucky

which emphasised so much the States' rights. Between 1807 and 1815 it was the turn of the New England States to become separatist in outlook and policy while the Southern States appeared to be reconciled to the Union as created in 1789. But in the course of the next few years the pendulum shifted again and the separatist centre of gravity was transferred to the South. In fact the area which was not for the time being satisfied with the policy of the Federal Government became anti-national in outlook and secessionist in policy.

The war between the United States and Great Britain, though opposed much by by the New England States, was in its effect beneficial to this area. It had temporarily done much damage to the economic interests of these States but it brought in permanent prosperity to them. Henceforward they became the strongholds of manufacturing interests in the country. The Tariff Act passed in 1816 quickened this prosperity of the Northern States to a great extent. It may appear strange but it is true that this Tariff Act which imposed twenty-five per cent. *ad valorem* duty upon textile imports was enthusiastically supported in the Congress by Southern representatives like John C. Calhoun of South Carolina. These gentlemen were now thinking in terms of the whole Union. They took it for granted that the tariff would mark

off the States from foreign countries by the high wall of demarcation which it would set up and thereby bind the States themselves more closely and far more strongly than anything else had done before. In fact they thought that the tariff would cement the fabric of the Union which was still rather loose in character. They had not expected that it would benefit one part of the country and damage the interests of another. They were optimistic enough to believe that the Southern States which were predominantly agricultural would also take to industrialism and profit by the tariff in this regard.

Disappointment, however, was not slow in coming. The South could not profit by the Act. It had no industrial aptitude. Its environments proved uncongenial for industrial development. Meanwhile the tariff schedules did not remain as they were first laid down by the Congress in 1816. They began to rise The result was that the people of the Southern States had to pay higher prices for the articles they had to consume while the people of the industrial North pocketed the profit.[5] This was a situation which the Southern

[5] It is interesting to remember in this connection that a theory known as the 'forty-bale' theory was at this time enunciated in the South. It was given out and believed that American protection "so decreased the English purchasing power for American cotton, and enhanced the price of supplies to the American consumer, that

people could not be happy to contemplate. They felt increasingly resentful. South Carolina, the home State of Calhoun, became especially chagrined. It questioned itself if it was worthwhile remaining within a Union by the economic policy of whose Government one part was profiting immensely and the other part was decaying from year to year. It was out of this sullen and resentful temper that the doctrine of nullification was born.

Apart from the question of tariff and the economic condition of the South, there happened about this time several events which also released separatist forces in the country and strengthened the separatist atmosphere of the Southern States. In the first place it is necessary to refer to the famous case, *McCulloch v. Maryland*,[6] in which judgment was issued by Chief Justice Marshall in 1819. The legislaure of the State of Maryland had passed a law to the effect that if a branch was established in this State without its authority by the Bank of the United States, it would be required either to print its notes on stamped paper or to pay a specified tax to the State Government. The Baltimore branch of the Bank of the United

forty out of every hundred bales of cotton produced in the South were in effect plundered by the Northern manufacturers." See Morison—Oxford History of the United States, Vol. I, p. 387.

6 4 Wheaton 316.

States refused to comply with any of the alternative demands. The dispute was first disposed of by the State Court of Appeals in favour of the Maryland Government. But against the decision an appeal was made to the Supreme Court of the United States which heard the case and issued the decision through its Chief Justice. The judgment which Marshall delivered has been regarded ever since as of great nationalistic significance. It brought home to the people in the most authoritative manner the true nature of the Union and the powers of its Government. But while the judgment itself was expected to stimulate a national outlook, there is another factor to reckon with in this connection.

The counsel for the State of Maryland in arguing the case on behalf of its Government made a significant observation. "The powers of the General Government," he pointed out, "are delegated by the States, who alone are truly sovereign, and must be exercised in subordination to the States, who alone possess supreme dominion." In other words the sovereignty was vested not in the people of the Union collectively but in the different States separately, and it was open to these different sovereign States to declare an exercise of power by the General Government as unconstitutional and to turn it down on that ground. So although the judgment

of the Supreme Court in this case constituted really an important milestone in the growth of the Union and its Government, still the fact stood out that a loose construction of the provisions of the Constitution as made by the Counsel for Maryland had now an opportunity of burning itself deep into the mind of a large section of the people. These people might have so far some prejudice against the Central Government. They might have thought in terms of their own States. But still their notion about the question of sovereignty might have been only vague and uncertain. This vagueness was now largely removed and their ideas about State sovereignty became systematised and confirmed by the arguments which the counsel set forth before the Supreme Court. Floating ideas about the sovereignty of the individual States were in fact given some definite shape by these arguments in 1819. From this standpoint the case, *McCulloch v. Maryland,* had a positively separatist effect, especially in the South.

Events leading to the Missouri Compromise of 1820 also contributed much to the growth of sectionalism in the South. The sensitiveness of the Southern States in regard to slavery was notorious. They thought that their prestige was bound up not only with the maintenance of this institution in their own States but also with their right to extend it to the new States which might be admitted

into the Union. When, therefore, the people of the North tried to restrict this right on their part, the Southern people became furious. In 1803, the Louisiana territory was purchased by Jefferson for the United States. Several years later the planters of the South proceeded to colonise the territory of Upper Louisiana. Inevitably they were accompanied by their human chattels. For the time being nothing was done by the Congress to stop this introduction of slaves and slavery into this territory. In 1819, however, when a bill providing for the admission of Missouri (Upper Louisiana) into the Union as a State was introduced in the House of Representatives, an amendment was moved to the Bill to the effect that Missouri would be admitted as a State provided further introduction of slaves was prohibited. This set the South ablaze. The amendment was carried in the lower house but was lost in the Senate. A deadlock was thus created which was broken in the following year by a compromise between the North and the South. This was to the effect that Missouri would be admitted as a slave-holding State but slavery would be prohibited in the territory of the United States north of latitude 36° 30″. For the time being the controversy died down, but not before the Union had been shaken to its foundation. The frankenstein of State sovereignty had raised its head, though only to lower it for the time.

Forces of sectionalism and State sovereignty were strengthened further by the events which culminated in the decision by the Supreme Court of the case, *Osborn v. Bank of the United States.*[7] Some time before the Supreme Court decided in 1819 the famous case, *McCulloch v. Maryland,* the legislature of the State of Ohio had passed an Act under which a tax of fifty thousand dollars would be levied upon any bank doing business in the State without its legally expressed approval. Thus empowered the State sent its agents to seize the money of the branch of the United States Bank located at Chillicothe. The Bank naturally sought the protection of the local federal court whose order, however, was ignored by the State auditor, Mr. Osborn. Moreover the Ohio legislature passed resolutions approving of the doctrines enunciated twenty years before by the State legislatures of Kentucky and Virginia in their famous Resolves. It even went to the length of withdrawing all protection from the Bank and virtually declared it an outlaw in the State of Ohio. The case was finally decided in 1824 by the Supreme Court. The judgment was issued by Chief Justice Marshall and it became a landmark in the growth of national prestige and Union strength. But for the time being the case and the circumstances leading to it only aggravated State particularism.

[7] 9 Wheaton 738.

The ground was thus steadily prepared and the stage was firmly set for the last act of the tragedy to be played. By 1828 the atmosphere in the South had become surcharged with suspicion and indignation. When therefore "the tariff of abominations" was adopted by the Congress in this year, the spirit in certain parts of this area became definitely separatist. In South Carolina, where people were becoming increasingly impoverished, and correspondingly discontented, the separatist movement became especially the strongest. John C. Calhoun, the South Carolinian statesman, who was elected Vice-President of the United States in 1828, and who had been an enthusiastic believer in American nationalism only a dozen years before, reacted with equal enthusiasm to the wave of discontent which was now sweeping over his own State. He did not want to see South Carolina or for the matter of that any other State seceding from the Union. But at the same time he did not want that the powers of the Central Government should be exercised by it according to the decisions of the majority in the Congress and to the detriment of certain units of the federation.

Calhoun enunciated his ideas regarding the relations between the States and the Federal Government in a book entitled *Disquisition on Government.* This was a notable publication, important not merely because of the theory of nullification which it expounded but also because of its scholarly

character. In fact one writer has observed that "Calhoun's *Disquisition on Government* and the papers which comprise the *Federalist* are the only first-rate contributions made by the United States to the literature of political theory."[8]

Calhoun did not believe in the theory of divided sovereignty which had been generally accepted in the United States since the federation was launched in 1789. He regarded it as vicious to believe that the Central Government was supreme and sovereign within its own sphere of jurisdiction as the State Governments were in their own fields of authority. Divided sovereignty was to him an impossibility. Sovereignty must be indivisible because "to divide it is to destroy it." The question then was as to where this sovereignty might be vested. Calhoun was of the view that it was neither vested in the Federal Government nor in the people of the Union. It was still vested in the States.[9] It was they as sovereign bodies which were responsible for setting up the Union. By establishing the Union and its Government, however, they had not surrendered their sovereignty. They still retained every portion of it. They might forego certain

8 W. S. Carpenter—The Devlopement of American Political Thought, (Princeton University Press), 1930, p. 143.

9 The distinction between the old Confederation and the new Federal Union consisted, according to Calhoun, only in this that while the former was a league of State Governments and derived its power from them, the latter was a league of sovereign communities, deriving its powers from these communities.

attributes of their sovereignty for the time being and allow the Federal Government to exercise them on their behalf. But they were not surrendered for good. They were subject to recall at any moment. So the powers which the Federal Government might exercise were not sovereign powers. They were not permanently vested in it. They were delegated to it for the time being. But they might be withdrawn at any moment as well.

So by virtue of the sovereignty being vested in the States, it was impossible for the Federal Government to work independently of the States. It was still dependent upon them. Secondly, Calhoun enunciated another doctrine under which no decision of the Federal Government could be operated in a State irrespective of its wishes. This is the doctrine of *concurrent majority.* Calhoun did not believe in the principle of the usual majority rule. In fact he vehemently protested against the despotism of the majority. If this despotism was to be avoided, it was essential to substitute "concurrent majority" for "numerical majority." Constitutional government, he observed, would not be worked in its right spirit on the basis of deciding issues by numerical majority. If it was to be worked on right lines, it was necessary "to take the sense of the community, by its parts, each through its appropriate organ." It was not possible for the numerical majority in any assembly or convention to arrive at a decision which would

be acceptable to each interest or portion of the community. So if injustice to any interest or portion was to be avoided, it was essential that each such interest or portion should have the right to decide by its own majority if the measure should be applicable to itself or not.

Calhoun was of opinion that this principle of *concurrent majority* should be acted up to in every country constitutionally administered. It was to be certainly acted up to in the United States where it was most unlikely that a measure passed by the Congress by numerical majority would be acceptable alike to all the States which composed the Union. Every State must have the right to decide by majority through its sovereign organ, the Constitutional Convention, whether a law passed by the central legislature should be allowed to be operated within its frontiers. If the Convention found it detrimental to the interests of the State, it must have the right to nullify it. In that contingency the central law would become inoperative in that State.[10]

So before 1832 two theories were enunciated—the first being that of the sovereignty of the States,

[10] See Merriam—American Political Theories, pp. 274-78. See also Sobei Mogi—Problem of Federalism, Chapter VI, Section 3. *Cf.* also Carpenter—*Op. cit.*, pp. 144-46. It should be noted that the theory of concurrent majority did not originate in the brain of Calhoun. It had already been enunciated by John Taylor of Caroline County, Virginia. He was a consistent advocate of State rights.

and the second being that of the concurrent majority and the right of nullification. An attempt was made in 1832 to apply in practice the latter doctrine. In this year the Congress passed a new Tariff Act. It was not worse, rather better in certain particulars, than the "Tariff of Abominations" of 1828. But it was expected to be a permanent measure. Either on this ground or because of the fact that the atmosphere in South Carolina had by this time become absolutely bitter and defiant, the people of this State decided to put the doctrine of nullification to the test. A State Convention was called to meet and in November, 1832, it declared the Tariff Act as unauthorised by the Constitution of the United States and as such null and void and not binding "upon this State, its officers or citizens."[11]

For the time being South Carolina was satisfied with such a declaration only and nothing further was done. A compromise was brought about in regard to the question of tariff, and the people of the South desisted on that score from proceeding further with their doctrine of nullification. But the theories which Calhoun had enunciated had burnt themselves deep into the mind of a large section of the people, and became the dogma of the "State-Rights" party. It is true that at the

[11] See Morison—The Oxford History of the United States, Vol. I, p. 398.

time when Calhoun had set himself up as the champion of State sovereignty and the doctrine of nullification, Daniel Webster of Massachusetts entered the political arena as the protagonist of the national theory of the Union and as the champion of the doctrine that the sovereignty vested in the people of the Union. A finished orator as he was, he did more than any other single person to popularise the idea that the Union was an indissoluble one and must continue to exist irrespective of the wishes of the people of this or that State. In course of his many speeches he tried to bring home to his fellow citizens the fact that the Union was formed not by the peoples of the States but by the people of the United States, that the Constitution was the result of a compact not between the States but between the individual citizens and that the Union was a compact when it was being created, but once it was accomplished, it became law which none could violate without being liable to punishment.[12]

For over twenty years Webster was a dynamic force in the nationalist direction in the United States. But he could not stem the tide of particularist views which were now flowing along the channel that Calhoun had chalked out for them. Particularism could not be conquered in the United States by speeches. It had to be conquered by

12 Merriam—*Op. cit.*

blood and iron. Until the people passed through the cauldron of the Civil War, there was no triumph for the doctrine of national sovereignty.

So during different periods of the history of the United States, different ideas were entertained as to the relation between the federation and its units. During the first period it was widely held that sovereignty was divided between them. In the second, however, sovereign authority was denied altogether to the federation and it was assumed, at least in the South, that such authority was exclusively vested in the States. The Civil War gave a burial to all ideas as to the location of sovereignty which had been cherished so far and established the view that it was located in the nation.

But although during different periods of history different ideas were cherished as to the relations between the States and the Union, there is no gainsaying the fact that the Central Government acquired fresh strength and power in all periods. It will be discussed in the following chapters how and why the Central Government came to acquire an ever-widening authority and jurisdiction.

CHAPTER VI

The Central Government and Nationalism

The balance of power between the Union and the States, as created in 1789, could not be maintained intact in after-years. It became gradually and increasingly weighted in favour of the Central Government at Washington. We have seen already that the great French publicist, Tocqueville, found in the thirties of the last century that the Central Government was only one department of foreign affairs. Its duties in other fields were so few and so simple that it might be regarded as an exception while State Government was the rule. But to-day, one century after this observation was made, the central authority has so grown and central jurisdiction has so ramified that it is evident even to a casual visitor that the Government at Washington has completely overshadowed the State Governments.

This accession of strength on the part of the Central Government has not been so much brought about by any regular and conscious amendment of the Constitution [1] as it was created by the fathers in 1787-88. This has been mostly due to several other factors. In the first place it should

[1] We shall have occasion to see later, that some of the amendments have enlarged central jurisdiction.

be known that while in 1789 and in the years immediately following, the functions which were assigned to the Central Government were simple in nature and narrow in scope, with the passing on of years they became increasingly complex in character and wide in scope. Necessarily in the discharge of these functions the Government at Washington came to exercise an ever-growing influence and power in the country. The more the scope of these functions widened and expanded, the greater and the wider became the jurisdiction of the Central Government in the Union.

Secondly, the growth of central authority and jurisdiction was due to a liberal interpretation of the old provisions of the Constitution. There were many duties of government which admitted in 1789 of being efficiently tackled on a local basis but which with the change of circumstances became national in character and required national control and administration. Again in the simple civilization of 1789 there were many questions which demanded no attention of the government at all, but which later not only demanded such attention but demanded it from the Federal. Government. By a broad and generous interpretation of its powers the Central Government found it possible to undertake responsibility in one form or another in these spheres.

Now whatever might be the causes of the extension of authority and jurisdiction on the part

of the Central Government, it is a fact that this assumption of new power and new jurisdiction would have been out of the question if the people of the Union were not ready to concede it to the distant Government at Washington. If they remained as separatist in outlook and as isolationist in temper in later years as they had been when the Constitution was first framed, the Central Government could not have exercised an increasing jurisdiction and power as it actually did. The attitude of the people, however, did not remain long as it had been when the fathers grappled with the task of framing the federal contitution for the country. Gradually and almost insensibly their attitude became increasingly nationalistic.

One of the reasons for such growth of nationalism and of such sense of unity among them was to be found in the presence of the Central Government itself. The very fact that the people happened now to live under the common Central Government with which they were directly associated and to which they owed allegiance on their own account, was sufficient to break down to a great extent the old isolationist spirit and to create in them a new unity of outlook. Everywhere in the world the Central Government has a unifying influence of its own and in the United States also there could be no exception to this rule. Every department of the Federal Government has certainly contributed to this centralising and unifying

influence. The legislative, the executive and the judicial branches have stimulated in their own way the sense of unity among the people.

But it may be said that of all the branches of Central Government, the executive has had the greatest influence on the mind of the American citizens. This must have been due to the peculiar organization and character of the executive of the United States. In the first place the executive was made by the fathers absolutely independent of the other branches of the Government. It was not to be selected from, nor responsible to, the legislature. For its conduct of the executive administration, it was not to be accountable to either house of the Congress. This certainly increased its authority and augmented its prestige to a very considerable extent. Secondly, the fathers of the Constitution had no faith in collegiate executive. They were definitely of opinion that if the executive authority was vested in a committee, however small, it would lack both vigour and promptness which are the essentials of executive administration. If again more than one person were made responsible for executive administration, it would be difficult to localise and fix executive responsibility.[2] So they decided that the supreme executive

[2] For discussion regarding the comparative merits and pitfalls of single and collegiate executives in the Federal Convention. See Hunt and Scott—*Op. cit.*, pp. 37-56. That a single Magistrate would be more responsible to the whole Union and represent its interests more perfectly than a plural executive was pointed out by Mr. Butler. *Ibid.*, p. 49.

authority of the Union should be vested in one person only. He would have his advisers and his assistants but no colleagues. Not only again the President was thus invested with full and undivided executive responsibility, but what is more, he was made also the Commander in Chief of the army. So both in civil and military matters he was to be the supreme leader of the nation. As during peace, so during war, it would be under his leadership that the nation must work. Necessarily a functionary with such position and jurisdiction could not but fire the imagination of the people and impress upon their mind an idea of the essential unity of the country, over the destiny of which he happened to preside.

The actual method of electing the President also became gradually an important factor of nationalism among the people.[3] It is true that the fathers had prescribed an indirect method. First an electoral college would be set up and then the members of this college would, by exercising their own discretion and wisdom, select the best person available for the presidency. But this method of choice actually could not be worked after some time. In fact, after the retirement of George

[3] Mr. Wilson who suggested the plan of electing the President through an electoral college was of the view that this method would produce more confidence among the people in the first magistrate than an election by the national legislature, which was another method mooted in the Convention. See *ibid.*, p. 42.

Washington from the presidency, the indirect election continued in theory only but in practice the election became really a direct one. The members of the electoral college were returned only on the understanding that they would vote for this or that candidate. They would not have any discretion in the matter. So the responsibility for electing the President was not exercised so much by the members of the electoral college as by those who returned these members. It is true that for some years to come, these members were actually returned not by the primary voters in the different States, but by their legislatures.[4] It is also true that until 1828, the presidential candidates were chosen by the Congressional caucuses. In spite of these facts, however, the election of the President roused in most instances a widespread interest in the country, and since 1828 when Jackson was returned to White House, it became really an event every four hours in the national life of the people. A functionary, whose election created so much interest and evoked so much enthusiasm among the general people of the country, could not but be a great centralising force.

The importance of the office of the President as a great unifying factor was enhanced further

[4] Even in 1824 in six of the States the legislatures appointed the electors. But four years later when Andrew Jackson was elected President, electors had ceased to be elected by State legislatures.

by the personal prestige and reputation of those who were elected to it from time to time. The fact that George Washington was persuaded to be its first incumbent could not but surround this office with a popular halo. During the initial and early stage his occupation of this office for eight years was certainly a very important factor in the growth of presidential authority and influence. Washington had been a great figure in the national life of the American people for over thirty years. It was under his military leadership that the War of Independence had been fought and won and it was under his chairmanship and direction again that the Federal Convention had worked for four months and framed the Constitution under which he became the first President of the Union. His prestige with his fellow citizens in all the States was considerable and his influence over them was immense. When such a man agreed to be elected to the office of the President, a good portion of his own personal prestige could not but be reflected on the office which he came to adorn. The view that the President of the Union was not merely an executive officer of the Congress, that he was not merely to give effect to the decisions, which the central legislature would adopt, but that he was the leader and steward of the people of the whole Union[5]

[5] See Chapter VIII.

became possible mainly because of the fact that the man, to whose leadership the people had been already accustomed, became the first President of the Republic. It is true that towards the close of his second administration Washington became the target of attack by a section of the people. His popularity was no longer so universal as it had been before. But he had already given the lead. He had already installed the office on a secure footing.

The immediate successors of Washington were also well known leaders of the people. John Adams had a prestige and reputation which were only second to those of Washington. Jefferson, who succeeded Adams to the Presidency, also carried to this office a reputation which was well established in the country. It was he who had drafted the Declaration of Independence in 1776. If he had done nothing else, the people of America would have still reason to remain grateful to him. But his services to his country were not limited to this drafting of the Declaration of Independence. He was the exponent of a body of political and social doctrines, in which was emphasised the liberty of the people in the face of the growing principle of authoritarianism in the country. Jefferson emphasised also the beauty and utility of the simple pastoral civilisation, although industrialism with all its complications was already spreading its tentacles in some parts

of the Union. His views had an appeal to the imagination of many. In fact so strong was the position of Jefferson in the hearts of the people that his election to the Presidency only augmented the prestige of this office and of the Central Government in the country.

The man again who succeeded Jefferson in the office of the President might not have acquitted himself in this capacity as efficiently as its predecessors, but it is a fact that his past services to his country were enormous. James Madison had certainly contributed most to the solution of the constitutional problem of the United States. The part he played in the Federal Convention was a notable and distinguished one. Later both in the House of Representatives and in the Cabinet the work which he put in could not but make him well known throughout the Union. In fact the great reputation which the first four Presidents carried to the White House must have infused into the office a great prestige and still greater authority.

During the next few decades, however, none of the incumbents of the presidential office except Andrew Jackson had possessed such a reputation. Jackson, of course, occupied a position which was almost unique. With a mind rather ignorant and untutored he was the prize boy of the rising democracy in the country and it was on the wave of this new democratic enthusiasm that he was

carried to the White House. His reputation had been spread already throughout the Union and when he was elected to the presidency in 1828, his election was acclaimed from every part as that of a new Cincinnatus who left his plough to lead a nation and his Government. But neither his immediate predecessors nor for twenty years his successors had his reputation and his prestige but still it could be said that before the Civil War broke out, the office of the President had already become a great unifying force in the country. Its incumbents more than anything and anybody else accustomed the people to the fact that the country was now unified under one Central Government.

Among the other factors of the Central Government it cannot be said that the House of Representatives has had much of an influence in a centralising direction on the mind of the people. This, of course, may sound rather paradoxical, for of the two houses of the central legislature, the House of Representatives was instituted to represent the idea of the nation and uphold its interests, while the Senate was to be a house of the States to buttress their interests as separate entities. But in practice the House of Representatives has hardly ever captured popular enthusiasm. It is not exactly true as some may think that the House of Representatives had never in its roll of membership prominent men of the country. At all times,

on the contrary, some of its members have been very prominent in American public life. In the first Congress, for instance, we come across men like Madison and Ellsworth, who had already made themselves famous in the Federal Convention at Philadelphia and whose contributions to the framing of the Constitution were vital and enormous. Early in the nineteenth century again we find on its floor men like Henry Clay who came to occupy a position in the country not inferior to that of any other public man. It was in the House of Representatives again that John Quincy Adams had an opportunity of participating in public affairs for nearly two decades after his retirement from the Presidentship of the Union.

In spite of these facts, however, it is to be admitted on all hands that the House of Representatives has never been able to capture the imagination of the American people. A parliamentary house attracts and engrosses the attention of the people, if there is a chance of something dramatic happening at any time on its floor. The British House of Commons attracted so much attention in its adolescence because of its struggle against the Crown and in later years, because of its power to throw out the ministry. When debate in the House might easily result in the deposition of one ministry from office and the accession of another to power, it could not but invite and

even engross the attention of the public in general. The American House of Representatives, however, was neither engaged in a struggle against a powerful sovereign nor had it the power to depose an executive. None of its debates had, therefore, any such significance, as might attach to the debates of the British House of Commons. The American public in consequence of this fact paid only a casual attention to what was going on in the House of Representatives. In view of the fact, again, that the House was not very much in the public eye, prominent men usually did not think it worth while to get returned to this body. So although at all times there might be a few noted men in the House, the generality of its membership could never make any impression upon the public mind.

There was another reason why the general public found comparatively little interest in the work of the House of Representatives. The business of this chamber, though inevitably concerned with national problems, had more to do with the questions of particular localities. Every State was divided into a number of single-member electoral districts, through which members were returned to the House. Much of the attention of these members had to be paid to the affairs which touched only the local welfare of these constituencies. When the House became largely concerned with

such local questions, it could not appeal much to the national imagination of the people. The House of Representatives could not in fact stimulate to the expected degree the sense of unity of the people and has never been a very important factor in the development of their nationalistic outlook.

The Senate, which was to represent the States as organic entities and protect their rights as such from the nation, has, on the contrary, wielded a nationalising influence in the country. Intended to be a house of the States, as pointed out above, this chamber has on few occasions worked in practice as the mouthpiece of State particularism. Even it cannot be said that it has acted as a special protector of the interests of the small States from the aggression of the large ones. In fact it has hardly ever been divided on any issue of large versus small States, although it has divided on economic issues on which agricultural States, large and small, may have combined against other States which may also have been large as well as small.[6]

The Senate has become an organ of nationalism in the country, contrary to both design and expectation. Several reasons may be cited in this connection. In the first place the Senators have never been elected by a small

6 Lindsay Rogers——The American Senate, Chapter IV.

electoral district. Until 1913 they were returned by the legislatures of the States and since then by popular constituencies,[7] each conterminous with the area of one whole State. Whether they were indirectly elected by the State legislatures or directly elected by the State-wide constituencies, there is no denying the fact that they have represented a State as a whole and not merely a portion of it. It is true that this principle of election was adopted mostly to emphasise the fact that the Senators were to represent the separate identity and separate sovereignty of the States. They were not to be in the national legislature as the representatives of the people of the Union, but they were to be there as the upholders of the State interests as such. But whatever might have been the motive behind the methods of election adopted from time to time for the return of the Senators, there is no duobt about it that they have contributed to the nationalising influence of the Senate. Even when a Senator was elected by a State legislature, his election evoked a State-wide interest, so much so in fact that elections to the State legislatures were often undertaken with an eye to the next election to the Federal Senate. Senatorial elections thus created considerable national enthusiasm

[7] XVII Amendment.

and succeeded on this account in accustoming the people to the Central Government and its jurisdiction.

Further, the importance of the fact that in respect of powers the Senate was better placed than the House of Representatives, should not be overlooked. The Senate was not merely the upper house of the national legislature. It had not merely legislative authority, which was co-ordinate with that of the lower house,[8] but it had also important executive functions. Appointments could not be made without its consent and the obligations of treaties could not be undertaken without its approval.[9] So we find in the first place that the election of Senators evoked wide-spread interest in the country and secondly as a factor of government the Senate proved to be a more powerful and influential body than the House of Representatives. In regard to appointments again it should be emphasised that it was not

[8] Under Section 7, Article I of the Constitution "all bills for raising revenue shall originate in the House of Representatives" no doubt but "the Senate may propose or concur with amendments as on other bills." In fact even in money matters the Senate virtually exercises equal authority with the lower house.

[9] Under Section 2, Article II, the President can make treaties only "by and with the advice and consent of the Senate," "provided two-thirds of the Senators present concur." In regard to appointments also the President "shall nominate and by and with the advice and consent the Senate, shall appoint . . ."

merely the Senate as a body which exercised great voice and considerable authority. Because of the development of the system known as Senatorial courtesy, individual Senators were given large patronage by the judicial exercise of which they could make their position great and their influence far-reaching in the country. Necessarily men very prominent in public life —men who did not think it worth-while to get into the House of Representatives—thought it right and proper to court membership of the Senate. All these three factors contributed to the great influence which the Senate exercised in the country in the nationalistic direction.

The federal judiciary also counted for much in the growth of the nation-idea among the American people and in accustoming them to the exercise of more and more authority on the part of the Central Government. The federal courts served this purpose in a two-fold way. So far as they did it by a liberal interpretation of the Constitution, we shall consider that aspect of their contribution at a later stage. At present let us only discuss how the federal courts, by their very creation and existence, enhanced the prestige and authority of the Central Government in the eyes of the people.

We have seen already that there was a controversy, both in the Federal Convention and

in the first Congress as to whether the federal judiciary should consist only of the Supreme Court or whether it should consist of a chain of courts, both inferior and superior. The "State-rights" people advocated that the federal judiciary should consist only of the Supreme Court and that other business should be conducted by the State courts. The friends of the Union, however, were definitely of opinion that the federal judiciary should not only consist of the Supereme Court but also of a number of inferior courts. The arguments which the two groups advanced in support of their contention have been elaborated in another chapter[10] and need not be repeated here. It should only be emphasised that by the passing of the Judiciary Act of 1789 a complete chain of federal courts was set up in the Union. None will deny that as a result of this arrangement the purposes which the protagonists of a strong union had in view, were fully gained. People now found that the Federal Government was no longer dependent upon the State Governments. It was independent of them even in judicial administration. It is a part of human nature that when people find a body already well entrenched in power, they easily flock to its standard and take its exercise of

[10] Chapter IV.

authority and jurisdiction rather easily and as a matter of course. Seconly the creation of the District and Circuit Courts[11] throughout the Union brought the federation nearer to the people. When they found that the federal judges of the District and Circuit Courts were working under their very eyes, they could no longer regard the Central Government as a distant authority with which they had little connection and to which they might or might not owe any allegiance. They had to regard it as part and parcel of their daily life.

The fact that in the infant stage of the Union, the Circuit Courts[12] became a great unifying factor, has been testified to by the historian of the American Supreme Court. He observes: "It was in fact almost entirely through their contact with the judges sitting in these Circuit Courts that the people of the country became acquainted with this new institution, the federal judiciary; and it was through the charges to the Grand Jury made by these judges that the fundamental principles of the new Constitution and Government and the provisions of the federal statutes and definition of new federal criminal legislation

11 Three Circuits and thirteen Districts.

12 Each of the three Circuit Courts was constituted by two Judges of the Supreme Court and one District Judge

became known to the people." [13] In course of such charges to the Grand Jury the judges tried also to bring home to the people the benefits of the Union already established and thereby to strengthen their attachment to the Federal Government. The Chief Justice presiding over the Circuit Court held in New York on April 4, 1790, for instance, observed: "It cannot be too strongly impressed on the minds of all how greatly our individual prosperity depends on our national prosperity and how greatly our national prosperity depends on a well organised, vigorous Government ruling by wise and equal laws, faithfully executed. . . ." [14]

The personnel of the federal courts was also largely instrumental in making the Federal Government very familiar among the people. The first Chief Justice was John Jay. Before his elevation to this august position, he had already been a well known national figure. Under the Confederate Government, he had acted for a number of years as the Secretary for Foreign Affairs and in this capacity his name must have travelled to every part of the Union. Later his selection as the special plenipotentiary to England to discuss the outstanding differences between that country and his own and to make

[13] Charles Warren—The Supreme Court in United States History, Vol. I, p. 59.

[14] *Ibid.*, p. 60.

a treaty between them must have also brought the Supreme Court, over which he was then presiding, under the eyes of the people. It is true that the treaty for which he was responsible was notorious in the United States History. No diplomatic decision has been more unpopular among the people of this country. The appointment of the Chief Justice as an Ambassador Extraordinary might also have been objectionable in principle, particularly when he still retained his seat on the federal bench. But, however unpopular the appointment of John Jay as plenipotentiary to England might have been and however notorious the treaty which he signed might have proved to be, there is no gainsaying the fact that they brought the Supreme Court and through it the entire Federal Government into the popular picture.

During the first decade of its existence the Supreme Court did much no doubt in popularising and strengthening the Federal Government. But still the year 1801, when John Marshall acceded to the office of the Chief Justice,[15] should be regarded

[15] In 1795 John Jay, the Chief Justice, became elected Governor of the State of New York and resigned from the Supreme Court. Mr. Rutledge of South Carolina, who had been Associate Judge of the Supreme Court and then Chief Justice of his State, was nominated to the vacancy. But his nomination was rejected by the Senate. The office, after being offered in vain to Patric Henry and Judge Cushing, was offered to and accepted by Oliver Ellsworth who had been a member of the Federal Convention and of the House of Representatives where he had

as a most important landmark in its history from this standpoint as in other respects. Marshall had already been a familiar figure in the United States and before his elevation to the federal bench he had been a Congressman and Secretary of State under John Adams. But none of his past records either as a lawyer or as a politician or even as Secretary of State could explain the great reputation which he earned as judge not only for himself as a jurist but also for the court over which he presided. His great judgments like those in *McCulloch v. Maryland* (1819) and *Cohens v. The State of Virginia* (1821) made the jurisdiction of the federal courts felt in every part of the Union and strengthened the position of the Central Government and the ties of nationalism in the country. When Marshall died in 1835 at the age of eighty and after thirty four years of service as Chief Justice, he had already made the federal bench familiar in every nook and corner of the United States.

The successor of John Marshall in the office of Chief Justice was of the opposite political persuasion. Roger B. Taney after a long legal career was included in the Cabinet of Andrew Jackson as Attorney General. Later when Jackson

drafted the Judiciary Act of 1789. In 1800 Ellsworth resigned and the post, after being offered in vain to John Jay, a former Chief Justice, was offered to and accepted by Marshall. *Ibid.*, pp. 124-75.

declared war on the Bank of the United States, he made Taney Secretary of the Treasury after promoting one and dismissing another incumbent of this office. Taney's appointment as Secretary of the Treasury was not confirmed by the Senate. But he had already fulfilled the desire of Jackson and withdrawn all the Government funds from the Bank of the United States and deposited them elsewhere. It was because of such subserviency on his part that people generally could not welcome his subsequent appointment as Chief Justice. He was called by some a "supple cringing tool of power" and one newspaper even went to the length of commenting that "the pure ermine of the Supreme Court is sullied by the appointment of that political hack, Roger B. Taney."[16] But, whatever might have been his political views and however unpopular he might have been at this time in certain political circles, there is no doubt about this that he was a well known figure in the country. When a man of his standing would be appointed to preside over the federal judiciary, it was not very uncommon that, while many people would acclaim this elevation on his part, many others would decry it out of political apprehension. But, however divided opinion might be in this regard, there could be no doubt about this that the Supreme Court would remain

[16] *Ibid.*, Vol. II, p. 290.

as familiar among the people in the new régime as it had been in the old. In fact, during the thirty years that he remained at the helm of the federal bench, people regarded some of its decisions as disastrous to the nation and as subversive of the unity of the country, but still it should be emphasised that the Supreme Court was never out of their mind.

Many of the Associate Justices appointed during the formative period of the Union were also well known men not only in their own States but in the country as a whole. William Paterson of New Jersey was for instance appointed an Associate Justice in 1793. He had been a prominent member of the Federal Convention and introduced in this assembly what came to be known as the New Jersey Plan of Union. He had also been the Chancellor of his State and Attorney-General in the Federal Government. Joseph Story was appointed an Associate Justice in 1811 in the vacancy caused by the death of Judge Cushing. Story was then only thirty-two years of age but his reputation had already spread beyond the frontiers of his own State, Massachusetts. He had been a Congressman and was, at the time of appointment, Speaker of the House of Representatives of Massachusetts. It is not necessary to cite further instances. But it is useful to remember that appointments such as those of Paterson and Story added considerably

to the prestige of the federal courts in particuar and of the Federal Government in general.

During the first half century of the Union, nothing nursed and strengthened it more than the fact that the people became increasingly familiar with it. Once they became accustomed to the exercise of authority and jurisdiction by the Central Government, they would easily and inevitably reconcile themselves not only to its continuance but also to the increase in its power and jurisdiction. This familiarity was brought about by all the three organs of the Federal Government. The President, the Senate and the Federal Courts all contributed to it.[17]

[17] The influence of the political parties in stimulating the spirit of nationalism has not been touched upon here on the ground that although parties have been an important factor of public administration, they have worked outside the legal frame-work of government. So only incidentally it may be mentioned here that the organisation of national parties helped people much in thinking nationally.

CHAPTER VII

Other Factors of the Growth of Central Power

We have seen in the previous chapter how the existence of the Central Government itself helped a great deal in breaking down the old spirit of isolation and in accustoming people to the administration of important functions of government on a national and central basis. In the present chapter, we propose to discuss some other factors working in the same direction. The first and foremost among them was certainly the development of communications between different parts of the Union. The sense of isolation and separation which dominated the mind of the people of the Colonies and the States in the 18th and early 19th centuries had been fostered to a considerable extent by the lack of communications in the country. It had been not only expensive but risky as well for people to move from one part of the country to another, although the country was then confined more or less to the eastern coast line. During the first twenty-five years of the federation little was done for opening communications which were then so lacking. But, after the War of 1812, the attention of both the State and Federal Governments was directed to this problem and attempts were made

to solve it effectively. "Internal improvements" became, in fact, a craze. Both roads and canals were to be opened at federal expense as a complement to the policy of protection which was adopted in 1816. It is to be mentioned that at the instance of Clay[1] and Calhoun the Congress undertook the building of a national road which was extended by stages from Cumberland in Maryland to Vandalia in Illinois. Individual States also developed communications inside their own territories either by building roads as Pennsylvania did or by opening canals as Virginia and New York[2] found convenient to do. Later these activities of the State Governments were fostered considerably by the policy of grant in aid which the Ferderal Government thought right to adopt.[3]

The problem of communication was solved most effectively by the introduction of the railways. It is significant that by the end of the 19th century about two hundred thousand miles of railway were laid in the United States. None should ignore this fact. In fact it should be reckoned with by every one who may want to say anything about the growth of centralisation in this

[1] Henry Clay was elected to the House of Representatives in 1810 from Kentucky and was elected Speaker. Later he was Secretary of State and Whig leader. He was also an unsuccessful presidential candidate on two occasions.

[2] See Morison—Oxford History of the United States, Vol. I, pp. 321-22.

[3] See Chapter on Grant-in-aid.

country. The net-work of railways, established from decade to decade, broke down effectively the isolation of the States. When a journey which took weeks to cover in the early part of the 19th century could be completed fifty years later in as many hours, it was but natural that the movement of people from State to State would be considerably facilitated. The inter-State familiarity which was thus engendered by the new facilities of travel helped much in undermining the separatist forces which had been so dominant before. Formerly the people of one State regarded their brethren of another with suspicion and distrust simply because they had little intercourse and little exchange of views and opinions among each other. But the railways shortened distance and developed intercourse. The things which the peoples had in common were therefore increasingly emphasised while points of difference in habits and traditions were more and more minimised and whittled down.

In 1833 Abbott Lawrence of Boston had written thus to Henry Clay: "If the system of internal improvements could go on for a few years with vigour.........this Union would be bound by ties stronger than all the constitutions that human wisdom could devise. A railroad from New England to Georgia would do more to harmonise the feelings of the whole country than any amendments that can be offered or adopted to the

Constitution. It is intercourse we want."[4] None will deny that he was right when he made this observation. New facilities of communication increased intercourse and intercourse in its turn created an effective sense of unity and nationalism.

The introduction of the automobile has further increased intercourse between the States. For the last fifty years automobile roads have so intersected the country that territorial divisions have become largely obliterated. In the State of New York more than eight per cent. of the people possess cars of their own. In other words practically every alternate family owns a car. Besides, the number of taxis and buses is innumerable. It is not unnatural, in view of these facts, that thousands are found to cross twice the boundaries of their own State everyday. For pleasure or for business the movement across State frontiers has become common.

With the development of communications other factors of unity also became encouraged and stimulated. Business and commercial relations between the States became more and more intimate and close. The articles manufactured in one State found market to an increasing degree in other States. The industrial and business concerns established in one part opened branches

[4] Quoted by Charles Warren in Supreme Court in United States History, Vol. I, p. viii.

in other parts of the country.[5] Chain stores and restaurants became gradually a characteristic of American economic progress. They made the connection between different federal units more close than people could have imagined possible decades earlier.

In fact, as a result of the development of communications and intercourse between the States, a standardisation of habits, tastes and fashions of the people became increasingly a feature of the civilisation of the United States. In dress, in food, in games, in education and in fact in every aspect of individual and social life, one notices almost a drab uniformity throughout the country from sea to sea and from the Canadian to the Mexican border. Even the old distinction between the planter and the industrialist has broken down to an appreciable extent.

In the 19th century it seemed no doubt to be true that two civilizations were flourishing side by side in the United States. The North with its manufacturing industries and the South with its cotton plantation seemed to be the home of two distinct nations. It should be remembered that even this division of the country into two

[5] In 1839 the Supreme Court was confronted with the question whether a corporation had power to make contract outside of the State in which it was chartered (Bank of Augusta *v.* Earle: Bank of the U. S. *v.* Primrose; New Orleans and Carrolton R. R. *v.* Earle). See Warren, *Op. Cit.*, Vol. II, p. 328.

civilisations helped much in breaking down the isolation of the States as such. People thought for years so much in terms of the North and the South that they ceased to put equal emphasis upon the autonomy of the individual States. It is true that there was no unity of outlook among the people of the United States. But the separatism of the North and the South [6] was basically different from the separatism of the individual States. The leaders of the South no doubt made the rights of the States as such the basis of their opposition to the Central Government and the Northern people. But actually they were thinking not so much in terms of their individual States as in terms of the entire South. So, although there was a cleavage between the two geographical areas of the country and although it retarded the growth of the nation-idea among the people, still it should be remembered, however paradoxical it may sound, that it removed one of the obstacles from the path to unity and nationalism. It threw into the shade the particularism of the States. So from the stage of the isolation of the different States, people advanced to the stage of the isolation of the North and the South. If one more step was advanced, this cleavage also might be done away with and nationalism might become triumphant in the country.

[6] The newly settled West had its own problems which made it rather a distinct unit by itself.

This step, however, could not be advanced by peaceful methods. The cleavage could be done away with only by the bloody Civil War in which the North and the South were engaged for four years. When at last the North triumphed over the South, the main issue which had driven a wedge between the two parts become dead. Slavery had been abolished by the Emancipation Proclamation and this abolition was confirmed by the XIII Amendment to the Constitution. With the abolition of slavery agriculture and plantation also gradually ceased to be what they had been before. They became considerably industrialised[7] and the differences between the industrial life of the North and the agricultural life of the South were largely obliterated in consequence. Nothing impresses a foreigner more to-day than the uniformity of life of the American people throughout the great and far-flung country. People with such uniformity and standardisation of manners and customs could not fail to have a national outlook. In fact such outlook came to characterise the American people in an increasing degree once the question of slavery was solved by force.

It should be remembered in this connection that the 19th century was the age of nationalism in Europe. There were national movements in Italy and Germany since the conclusion of the Napoleonic Wars and the Treaty of Vienna.

[7] André Siegfried—Canada, p. 125.

Particularly since the forties these movements became a force to be reckoned with. It is common knowledge that by 1870-71 nationalism triumphed in both the countries. In Italy a centralised unitary State was created in which one government with its location at Rome became responsible for the administration of the different parts of the peninsula in all its aspects. In Germany the government was constituted on a federal basis no doubt but here also the central government was a powerful agency of public authority.

It was but inevitable that the national movements in Europe would have their repercussions across the Atlantic. In was only natural that the people of the United States should be inspired to a great extent by the principle of nationalism which was moving so much the mind of the peoples of different European countries. So long of course as the issue of slavery was keeping the South separated from the North, nationalism could not be the dominant sentiment of the people. But once this issue became dead as a result of the Civil War, national feeling began gradually to sway the mind of the citizens of the United States. Common language[8] of the Americans in every part of the country helped much in fostering this national sentiment and outlook.

[8] English is the common medium of expression. It is the only official language in the Union and in all the States except New Mexico where Spanish is the alternative language allowed.

The oratorial efforts of Daniel Webster could not successfully infuse into the mind of the American people a spirit of nationalism, so long as he lived.[9] They could not make any impression upon the people of the South as long as they were obsessed with the question of slavery. But when the Civil War was over and the people got back their natural bearings, the speeches of the great orator of Massachusetts were read and re-read by people with enthusiasm and Webster dead exercised greater influence on their mind than Webster living. The peroration on the Union with which his great and famous speech in the Senate was concluded on the 26th of January, 1830, has, for instance, been declaimed on thousands of platforms by school boys and it could not have failed to infuse into their plastic mind a real enthusiasm for the Union and a great love for the country to which they all belonged.

The growth of the national sentiment did not necessarily pre-suppose the growth of the powers of the National Government. But it created an atmosphere which proved favourable to the augmentation of central jurisdiction and authority. In fact most people became henceforward easily reconciled to the addition made from time to time to federal functions. While the growth of nationalism thus ensured favourable

[9] Died in 1852.

reception to the development of central authority in the United States, circumstances in the country were otherwise also so changing as to make substitution of central jurisdiction for State authority inevitable in certain fields. Rapid development of communications and the growth of large-scale industries changed the face of the civilisation of the United States. The distribution of power between the State and Federal Governments, which was plausible in the horse and bogey age, became absolutely unsuited to the age when people travelled in railway trains, in motor cars and in aeroplanes.

Industry might be controlled by the State Government or might be left absolutely to itself, so long as it was in the cottage stage. But when it assumed a huge size, with widely ramified branches, with extensive market spread over the entire Union and beyond it and entering into competition with similar industries in other parts of the country, it naturally outlived the stage where *State* control might have been effective. It reached a stage where national control became desirable. Again education might be regarded as a private or at best a State affair so long as its benefit was to be confined to a small group of people and so long as it was simple in character. But, as it was thought necessary to extend its benefit to other groups of people and as it became increasingly complicated in character, it was found in the first

place that without financial assistance from the Federal Government many of the States could not provide adequate educational facilities to their children and secondly that without central regulation and supervision a common standard throughout the country, which was so very essential, could not be maintained. What became true in the field of industry and education became true in some other fields as well. The old distribution of powers between the Federal and State Governments became out of date and extension of federal power in one form or another became indispensable.

Another factor which facilitated in an indirect way the augmentation of central power should be discussed before we can pass on to a few constitutional amendments which directly added to the jurisdiction of the Federal Government. This factor consists in the views and opinions which were held by a number of prominent people in the North in respect of the position of the Southern States after they had been defeated in the Civil War by the federal forces. When this War ended, the question arose as to what measures were to be taken for the reconstruction of the defeated and devastated States of the South and as to how these measures were to be taken and enforced. In this connection several theories were enunciated and we shall consider three of them here as relevant to the question of the

development of central power. The first was that the States which had seceded from the Union and had been defeated later in the Civil War should be regarded as conquered territories. They lost their original character as States and might be admitted again into the Union as new States. Meanwhile the Congress could adopt any measures it chose for the reconstruction of these territories. The second theory which was enunciated in this connection was that a State which was attempting secession from the Union ceased to be a State on that ground and it was open to the Congress to undertake regulation of the affairs of that territory. The distinction between the first and the second theories consisted in this that while in the first secession must take place before a particular State would cease to be a State, in the second mere attempt at secession was enough. The upholders of the second theory did not admit that the Southern States had gone out of the Union. They had only tried to go out of it. But this was sufficient ground for their losing Statehood. The third theory was that because of their attempt to secede from the Union, the States had temporarily forfeited their rights as such. They did not permanently cease to be States but for the time being they were in a diseased condition and therefore their Statehood was kept in suspension. It was for the Congress to act as physician and take complete charge of the patient. It was to lay down

conditions under which the patient was to live and to issue orders which the patient was to obey.. After such treatment for a period of time, the States might be cured of their malady and restored to their normal life.[10]

It does not matter that none of these theories were accepted in toto and as such acted up to. The very fact that they could be enunciated in such a bold and aggressive manner would show how far people had travelled since the days when sovereignty of the States was regarded as sacrosanct. Besides, although it was not accepted that as a result of the secession or attempted secession the States had been completely wiped out, still it was authoritatively declared that "the rights of the State as a member, and of her people as citizens of the Union, were suspended" because of the condition of the Civil War.[11] In other words the last of the three theories enunciated in the previous paragraph was virtually, though not exactly, adopted in determining the position of the seceding States. The work of reconstruction in these territories was undertaken on the responsibility of the Congress and it may be said that for a period these States were, in all essentials, wards of the Federal Government. That the Federal Government could assume this position of a guardian vis-à-vis a number of States

[10] A. C. McLaughlin—*Op. Cit.*, p. 649.

[11] The judgment of the Supreme Court in Texas *v.* White. 7 Wallace 700.

was significant. It accustomed the people to the new rôle of the Central Government and, although after some time, when things became normal, this Government became again a government of limited powers, still an atmosphere had been created in which people would not be very much shocked if they found this Government assuming new power and jurisdiction from time to time.

The Constitution adopted in 1788 and first operated in the following year has so far been amended twenty-one times. Of the amendments the first ten were adopted only one year after the first operation of the Constitution and they might be regarded virtually as part and parcel of the original Constitution. It should be mentioned that some of the States had approved of it only on condition that these amendments were incorporated in it. The two other amendments were also adopted during the next twelve years—XI in 1898 [12] and XII in 1804. None of these amendments to the Constitution added to the jurisdiction of the Federal Government. On the contrary, some of them constituted positive checks on the exercise of even the existing power of this Government and some even curtailed its jurisdiction and enhanced the jurisdiction of the authorities of the State. The first nine amendments for instance enumerated the

[12] The proposal for amendment was adopted by the Congress in 1794 but not till 1898 the requisite number of States adopted it.

rights of the individual citizens which the government must not infringe in the exercise of its power. The tenth made clear and definite the residuary powers of the States and thereby emphasised the fact that the Federal Government was a Government of only limited powers. The eleventh was adopted with the positive purpose of withdrawing from the Federal Supreme Court a jurisdiction which it had exercised before.[13] The next amendment only regulated the system of voting in the election of the President and Vice-President of the United States and did not either curtail or add to the jurisdiction of the Federal Government.

The 13th, 14th, 15th, 16th, and 18th amendments, however, had the effect of augmenting the jurisdiction of the Congress. The 13th amendment was adopted in 1865, more than sixty years after the adoption of the 12th. It made the institution of slavery unconstitutional in the United States and empowered the Congress to undertake necessary legislation to this end. The Emancipation Proclamation, issued by President Lincoln in 1863, abolished slavery only in those States which had seceded from the Union and were at war with the Union Government. Slavery in those States which were loyal to the Union and in those parts of the seceding States which had withdrawn from war continued as before. In some of these areas

[13] In respect of a suit instituted against one State by a citizen of another State or of a foreign State.

slavery was abolished later by measures adopted by the States concerned. But in some other States as Delaware and Kentucky slaves were emancipated and slavery abolished only by the 13th amendment.

The 14th amendment was adopted in 1868, the Secretary of State announcing the ratification on the 28th of July of this year. It laid down that "All persons born or naturalised in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Further the amendment empowered the Congress "to enforce, by appropriate legislation, the provisions of this article." This amendment was passed with the specific object of protecting the interests of the negro population. But actually the "due process" clause has been utilised by the courts for other purposes and the amendment has not succeeded in offering the black population that kind of protection against white invasion upon its rights and privileges, which was contemplated by its sponsors and supporters. But still it should be acknowledged that without the amendment and the jurisdiction

which it conferred upon the Congress, greater excesses would have been committed upon the negro population.

The fifteenth amendment which was adopted in 1870 was also connected with the rights and privileges of the black people. It provided that "the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude." It further empowered the Congress "to enforce this article by appropriate legislation."[14] The sixteenth amendment which was first proposed in 1909 and was finally ratified in 1913 has helped in widening central authority more than any other amendment passed before or since. It provided that "the Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." In 1895 the Supreme Court had declared *ultra vires* an Act of the Congress, passed in the previous year and providing for a tax of two per cent. upon an income of more than four thousand dollars derived from any source. It had been declared unconstitutional on the ground that it was in conflict with Article 1 of the Constitution, which provided that

[14] This amendment has proved absolutely abortive. The Southern States have by different devices deprived the negro of the right to vote. These devices have been condoned by the Federal Supreme Court.

all direct taxes "shall be apportioned among the several States...according to their respective numbers ..." Since this decision was announced by the Supreme Court, the Congress had to hold up its hands for some years and to refrain from imposing any tax on income. But with the passing of the amendment in 1913, the impediment was removed and the Congress found it possible to undertake legislation for the levy of taxes on income. It was by such levy that the Federal Government has found it possible to finance many of the schemes of social work in the States and exercise thereby increasing authority in the sphere of the latter.

The eighteenth amendment which was adopted in 1919 prohibited the manufacture, sale, importation into, and transporation within, the United States, of all intoxicating liquors. It also provided that "the Congress and the several States shall have concurrent power to enforce this Article by appropriate legislation." It is true that, after less than fifteen years of experiment, this amendment was repealed in 1933 by the adoption of the twenty-first amendment to the Constitution. But, during the period that prohibition was tried in the country, the Central Government had certainly more to do than under other conditions. It had the responsibility to see that State laws regarding prohibition were not impaired in any way by the transporation of intoxicating liquors in the course of inter-State commerce.

This chapter may be concluded by emphasising that the jurisdiction of the Central Government did not remain as it had been determined in 1787-88. It was widened and extended with the passing on of years. The development of communications undermined the sense of isolation which was mainly responsible for the spirit of State particularism and for the consequent conferment of only limited powers upon the Federal Government. The national movements in different European countries had also their repercussions in the United States and strengthened national feeling in this country. The defeat of the Southern States in the Civil War and the post-War reconstruction of these areas under the supervision and direction of the Congress gave a new accession of strength to the Federal Government and made the atmosphere congenial for the augmentation of its jurisdiction in the future. Lastly some of the amendments to the Constitution added positively to central jurisdiction and power.

CHAPTER VIII

Growth of Federal Power by Liberal Interpretation

The Constitution, as it was framed in 1787-88 and put into operation in 1789, provided for the delegation of only a number of specific powers and functions to the Federal Government. It was to be expected that, as these functions were specific in character, the Central Government would not be within its constitutional right to assume any jurisdiction and assert any authority beyond this enumerated field. But it should be known that the powers and functions, which have been enumerated in Section 8 of Article I of the Constitution, are not in all cases as definite and as clear in their meaning as the framers of the Constitution might have wanted them to be. Two of the clauses of this Section are in fact general and even vague in character. They provide the loop-holes through which it became possible for the Congress to assume a responsibility greater and wider than what a literal interpretation of these clauses might warrant.

In the first clause, the Congress has been given power to "lay and collect taxes, duties, imposts and excises to pay the debts and provide for the common defence and *general welfare* of the United

States." It was obvious that the words "*general welfare*" might in the future be construed to mean many things not exactly contemplated by the fathers. Under cover of these words the Congress might regard itself as within its rights not only to collect taxes and raise revenue for, but also otherwise to deal with, subjects in addition to those which were clearly specified in the section. The last clause of section 8 of Article 1 again empowers the central legislature "to make all laws which shall be *necessary and proper* for carrying into execution the fore going powers, and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof." This clause may naturally be interpreted to mean that the legislative power of the Central Government was not limited to those functions only which were clearly and definitely laid down in the different clauses of the Constitution, but it was also to extend to other subjects if some legislation in regard to them was thought necessary for the efficient administration of the functions which were specifically delegated to the Congress and other branches of the Central Government.

It was during the first term of George Washington's presidency that the question of properly interpreting the powers of the central legislature was debated and discussed for the first time. Jefferson was at this time the Secretary of

State and Alexander Hamilton was the Secretary of the Treasury. The former was a "States-rights" man while the latter was a strong federalist and believed in strengthening and augmenting the position of the Central Government. While Jefferson wanted to keep this Government limited in power and circumscribed in jurisdiction, Hamilton wanted to strengthen it more and more and make it the principal agency of public authority in the country. In December, 1790, only one year and a half after the inauguration of the new Constitution, Hamilton proposed the establishment of a national bank, so that the Government might have greater facility in collecting taxes and in obtaining pecuniary aids. On the basis of this proposal, a bill was brought in the Congress for the establishment of such a bank. It was hotly contested in the House of Representatives by James Madison. He had been in the Federal Convention a strong and successful protagonist of the principles of nationalism. Now, however, he scented danger in the policy, which Hamilton was pursuing and opposed the bank bill on the ground that the Congress would transcend its powers if it adopted this measure. Inspite of his opposition, however, the bill was passed by both houses of the Congress and then submitted to the President for approval.

George Washington instead of giving his signature straightway to the bill, which had been

passed by the Congress, submitted it for opinion to the members of his Cabinet. This was an opportunity, which was seized by both Jefferson and Hamilton for giving expression to their views with regard to the interpretation of the powers of the Federal Government. Jefferson pointed out that banking was a function, which was not included in the enumerated powers of the Congress and it would be in his opinion an unconstitutional step on the part of the Central Government to undertake legislation on such a subject. He was in favour of strictly constructing those clauses of the Constitution which provided jurisdiction for Congressional legislation. He emphasised that under the tenth amendment of the Constitution[1] "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively or to the people." In other words the Congress was to exercise jurisdiction in respect of those subjects only which were specifically granted to it. Any subject beyond the enumerated list should belong either to the States respectively or to the people and as such outside the authority of the Congress. Jefferson was also definitely of the view that neither the *general welfare* clause nor the *necessary*

[1] This amendment was adopted in 1790 in response to the demand of the States-rights people who wanted to make definite the position of the States as the residuary legatee of all public powers and authority in the United States of America.

and proper clause could be interpreted as empowering the Congress to undertake the responsibility of establishing a bank.) Under the former the Congress was empowered only to lay and collect taxes but not to adopt a measure like the bank bill. Under the latter, he observed, only such new power could be exercised as was thought absolutely necessary for carrying out those functions which were specifically delegated to the Central Government. The establishment of a bank could not, however, be regarded as necessary from that standpoint. The Central Government could very well discharge all its obligations without any such institution.

Hamilton, as it could be expected, interpreted the *necessary and proper* clause broadly and liberally so as to prove that the Congress did not enjoy merely those powers, which were explicitly delegated to it but that it also possessed those powers which were implicit in its delegated jurisdiction and which followed from it naturally and inevitably. In other words the interpretation should be, in his opinion, liberal and generous and not merely literal. He was in fact definitely of the view that when a particular function was handed over to the Congress, its jurisdiction over it was full and complete. It would be entitled not only to pass legislation immediately necessary for tackling this subject but also to pass other measures, which might be thought necessary and

proper for the full discharge of its responsibility in respect of the function.[2]

So the doctrine of implied powers was enunciated on a clear and comprehensive basis by one of the acutest brains of the century in the New World. Washington accepted his point of view and signed the bank bill. Since then the Congress has not ceased to take advantage of the *necessary and proper* clause of the Constitution whenever required, and to expand thereby the ambit of its authority and jurisdiction.

As regards the "*general welfare*" clause, it should be emphasised here that its interpretation also was given by Hamilton a direction which has proved enduring. When the Constitution had been framed at Philadelphia and was awaiting acceptance and approval in different States, its opponents drew the attention of the public to this clause which together with the "necessary and proper" clause might unduly widen central jurisdiction. The Congress, they apprehended, would have power to provide for whatever it might consider as "general welfare" and further it might provide for it by any means which it regarded as "necessary and proper." The

[2] The criterion "is the *end*, to which the measure relates as a *mean*. If the *end* be clearly comprehended within any of the specified powers, and if the measure have an obvious relation to that *end*—and is not forbidden by any particular provision of the Constitution, it may safely be deemed to come within the compass of the national authority," so observed Hamilton.

supporters of the Constitution tried to remove this apprehension with arguments not altogether unconvincing. They pointed out that under the "*general welfare*" clause it was not open to the Congress to add to their ordinary legislative jurisdiction which was being clearly delimited by the other clauses of section 8 of Article 1. It was related to the taxing power and money expenditure alone. Madison did his best to clarify the meaning of the clause by way of bringing it home to the public that no "blanket" authority was being conferred upon the Congress by its insertion in the Constitution. The "*general welfare*" to which the Congress could minister by the exercise of its power of taxation and expenditure was the welfare which it could promote by its enumerated powers of legislation. It was not to cover any new subject or any new field of jurisdiction.[3]

Hamilton also had to refer to this clause in course of his writings [4] in defence of the Constitution. But he interpreted it at this time as literally as possible. He could not emphasise, in these writings, the far-reaching character of the power which was being conferred upon the Congress by the "*general welfare*" clause. By that he would have only scared away the doubters and strengthened the

[3] The Federalist, No. 41.

[4] *Ibid.*, Nos. 30 and 34.

ranks of the opposition to the Constitution for which he was seeking approval at the hands of the people. Nor could he put a very narrow interpretation upon the clause and its significance. So all that he did on this occasion was to explain it literally without putting any gloss on its meaning. Three years later in 1791, however, he had an opportunity of further explaining and interpreting the "general welfare" clause. He, as Secretary of the Treasury, presented to the Congress his Report on Manufactures in December of this year. It was in course of this Report that he made his significant observation on the clause. "The phrase," he observed, "is as comprehensive as any that could have been used, because it was not fit that the constitutional authority of the Union to appropriate its revenues should have been restricted within narrower limits than the "general welfare," and because this necessarily embraces a vast variety of particulars which are susceptible neither of specification nor of definition. It is therefore of necessity left to the discretion of the national legislature to pronounce upon the objects which concern the general welfare, and for which, under that description, an appropriation of money is requisite and proper." In other words the Congress might appropriate money for any subject which, in its opinion, would conduce to "general welfare." There was to be no limit to such subjects. They would automatically include "the

general interests of learning, of agriculture, of manufactures, and of commerce."

Hamilton interpreted the clause as he did on this occasion to justify the right of the Congress to grant bounties to selected manufacturing industries, which he was recommending in his Report. This recommendation, of course, did not bear any fruit as the Report itself had fallen absolutely flat. But it should be mentioned here that the subsidy granted by the Congress to the fisheries in 1792 was an indirect result of this recommendation. As the grant of such a subsidy could be justified only by a liberal interpretation of the "general welfare" clause, Madison spoke and voted against it. But in the teeth of his opposition the Congress, virtually under the inspiration of Hamilton, exercised this right which none of the specific clauses of the Constitution had conferred upon it. The Congress expanded its jurisdiction under the "*general welfare*" clause. A few years later Washington in his final message to the Congress recommended that expenditure should be undertaken by this body for the encouragement of agriculture, the founding of a national university, and the promotion of manufactures. It was certainly known to him who made these recommendations and to the Committee of the Congress which supported his recommendation in regard to agriculture [5] that none of them could be acted up

[5] Nothing ultimately came out of the recommendation.

to by the Congress except under the "general welfare" clause.

Another attempt was made in 1816 to augment the power and jurisdiction of the Congress by taking advantage of the "general welfare" clause. A Bill, known as the "Bonus Bill," was introduced in and passed by the Congress. It provided that the bonus and the dividend which the Government would receive from the revived bank of the United States should be set apart as a permanent fund for effecting internal improvements, *e.g.*, the opening of roads or the cutting of canals. Now the power to make internal improvements such as these was not conferred upon the Congress by any of the specific clauses of the Constitution. This power could be exercised only if the "general welfare" clause was allowed to be interpreted broadly and liberally. The Congress had interpreted it in that light. But Madison, whose second term of presidentship was drawing to a close, vetoed the bill on the ground that the Congress had no power under the Constitution to pass such a measure. His successor, James Monroe, was at first inclined to look at the powers of the Congress from the same angle of vision as Madison. But on a further study of the subject, Monroe changed his views. In 1822 he let it be known that "My idea is that Congress has an unlimited power to raise money, and that in its appropriation they have a discretionary power, restricted only by the

duty to appropriate it to purposes of common defense and of general, not local, national, not state benefit." [6]

Ten years later Joseph Story[7] supported this standpoint in his *Commentaries* which was published in 1833. It should be remembered that Madison had observed in 1788 that "the general welfare" which the Congress could promote was the general welfare to which it could minister under the specific clauses of section 8 of Article 1 of the Constitution. It did not include any other item. But Justice Story pointed out that the "general welfare" clause did not limit general welfare to any specific items. The clause must be taken in fact as including every kind of general welfare. It did not matter if it was covered or not by the provisions of the specific clauses. If it was covered, well and good. If not, it must be promoted in addition to the specific functions of the Congress.

After the favourable opinions laid down by President Monroe and Justice Story, the Congress proceeded to exercise its powers under the "general welfare" clause more and more liberally and generously. We shall have opportunity of discussing the increasingly large appropriations

[6] See Chapter IV (The Spending Power) in Edward S. Corwin—The Twilight of the Supreme Court (1934).

[7] Associate Justice of the Supreme Court of the United States from 1811.

which the Congress thought it right to make henceforward, in the chapter on the "Federal Grant in Aid and Centralisation." We need not therefore discuss it here. But one thing should be pointed out at this place It should not be assumed that the controversy about the import of the "*general welfare*" clause was absolutely at rest after Monroe and Story had expressed themselves unequivocally in favour of its liberal and generous interpretation. It is remarkable that even as late as 1887 President Cleveland vetoed an appropriation bill providing only ten thousand dollars to the Commissioner of Agriculture for the purpose of making a special distribution of seed in the drought-stricken counties of Texas. He found "no warrant for such an appropriation in the Constitution." But inspite of attempts at such strict construction of the Constitution, which were made from time to time in high quarters, the appropriation roll began to swell and grants to States for purposes not specified in the Constitution began to multiply.

Just as the Congress has had its explicit as well as implied powers, so also the President of the Republic may be said to have both specified and implied responsibilities to discharge. In this regard also, it was Alexander Hamilton who first tried to interpret the constitutional provisions liberally and broadly. In respect of the powers of the Congress, he was at least handicapped by

the fact that they were conferred upon it by specific clauses of the Constitution. Even then we have seen how he took advantage of the "necessary and proper" clause and the "general welfare" clause of the Constitution by way of interpreting these powers as liberally as possible. But in respect of the position of the President, he was not subject to any such handicap. He could point out that the executive power was vested in the President in "blanket" form. He got an opportunity of elaborating his opinions when in 1793 Great Britain and France were at war and the United States was between the devil and the deep sea. The question of issuing a proclamation of neutrality by the President was hotly debated in the Cabinet. The subject of debate was whether the President had any power to make such a proclamation or not. It was at least not specifically provided for by the Constitution. But Hamilton observed: "the general doctrine of our Constitution is that the executive power is vested in the President subject only to the exceptions and qualifications which are expressed in the instrument." He quoted section 1 of Article 11 which provided that. "The executive power shall be vested in a President of the United States of America." He also quoted the form of the oath which the President was required to take under the same section. It runs: "I do solemnly swear (or affirm) that I will faithfully execute the office of the President

of the United States, and will, to the best of my ability, preserve, protect, and defend the Constitution of the United States." So he argued that the President was vested with the sole executive authority and as the proclamation of neutrality was an executive act, the President was entitled, by virtue of his position, to make it. It did not require any specific authority from the Constitution.

But the interpretation which Hamilton placed upon the powers of the President drove the Jeffersonians to fury. The latter were strict constructionists and were unwilling to see the President exercising any power not specifically conferred upon him either by the Constitution or by the laws of the Congress made in pursuance of the Constitution. The cleavage of opinion which became thus manifest has continued throughout the history of the United States. There have been at all times distinct and opposite views regarding the powers of the President. When the old party alignments became blurred in the twenties of the last century and new parties came into being, the opposing views entertained by the Federalists and Republicans regarding the powers of the President were taken over by the Democrats and the Whigs. When later in the fifties the Whig label disappeared, its attitude towards the office of the President was inherited by its lineal successor, the Republicans.

The Whigs and the Republicans have consistently held the view that not only the authority of the President is limited to the powers specifically delegated to him by the Constitution but he is in point of fact merely the executive agent of the Congress. His duty is only to carry out the decisions which may be arrived at from time to time by the Congress.[8] The Democratic Party has, however, from its very inception pinned its faith to the theory that the President is not merely an executive officer of the Congress, but he is the executive head of the country and the leader and steward of the American people. In his latter capacity he is not only to discharge the responsibilities which may be conferred upon him by the Constitution of the country and the laws made by the Congress in pursuance of this Constitution, but he is also to undertake other steps and other measures for the welfare of the people, provided only these are not expressly forbidden to him by the Constitution or by the laws of the Congress made in conformity with its provisions.

[8] It should be remembered in this connection that the 7th resolution of the Virginia Plan was to the effect that the supreme executive should be elected by the legislature. It should also be remembered that although the Republican Party has as a party regarded the President only as the executive officer of the Congress, its two outstanding leaders, Abraham Lincoln and Theodore Roosevelt held other views about his position and powers.

Andrew Jackson was the first President to proclaim it unhesitatingly and act up to it definitely that the Presidency was a popular (as opposed to Congressional) agency. He vetoed the bank bill of 1832 on the ground that it was unconstitutional although the Supreme Court of the United States had declared the bank as lawfully established in the case, *McCulloch v. Maryland*,[9] decided in 1819. The fact was that Jackson regarded the bank [10] as an institution hostile to the interests of the people and did not want in consequence that its lease should be renewed. Now in catering to the popular interests which, he thought, would be served by the discontinuance of the bank, he interpreted the Constitution in his own way irrespective of the meaning which either the Congress or the Supreme Court might put upon its provisions. Similarly when he wanted to dissociate the Government at once from the bank although the charter of the institution would not expire until four years later, he proceeded to act not only without any express authority from the Congress but against its decision to the contrary. It is significant that he applied for such authority from the Congress. When, however, this was refused, he fell back upon his reserve powers. Under the Act of the Congress it was for the Secretary of the Treasury to arrange for the deposit of the

9 4 Wheaton 316.

10 Bank of United States.

Government money. This functionary was, however, appointed (with the advice and consent of the Senate) by the President and might be dismissed by him. So he sounded the Secretary of the Treasury if he would act up to his instruction and withdraw Government funds from the bank of the United States. As the latter did not appear very accommodating in this respect, he was promoted to the office of the Secretary of State and another gentleman was appointed as Secretary of the Treasury. But when this officer also proved untractable, he was dismissed and the Attorney-General Roger B. Taney was appointed to the Treasury. His appointment in this capacity was not later approved by the Senate. But he had meanwhile acted up to the instruction of the President and arranged for the removal of Government funds from the bank of the United States to State banks. So Jackson had his way.[11]

(The theory which Jackson had enunciated and acted up to in regard to the position of the President proved twenty-five years later to be a great source of strength to Abraham Lincoln and a potent instrument in his hands for the augmentation of central power and jurisdiction.) Not only in disregard of the rightful authority of the Congress "to raise and support armies," he ordered on

11 W. E. Binkley—The Powers of the President (N.Y, 1937), pp. 76-77. The bank bill provided for the re-chartering of the bank when its existing charter would expire.

his own responsibility the increase of the army and not only again in disregard of the right of the Congress "to make rules for the government and regulation of the land and naval forces," he issued new rules for the observance by the armies in the field, but by the exercise of his war powers he created central jurisdiction in certain fields in which the Central Government was to exercise no authority under the positive provisions of the Constitution. He for instance thought it right to issue as the Commander in Chief of the Army and Navy of the United States the famous Emancipation Proclamation that upon the 1st of January, 1863, all slaves within any State or district then in rebellion against the United States, "shall be, then, thenceforward, and for ever free." The abolition of slavery was a subject over which the Central Goverment was not expressly given any authority by the Constitution. But Lincoln exercised this authority and thereby augmented central jurisdiction by virtue of the reserve powers which, he thought, were vested in him as the Commander in Chief. It is true that a constitutional amendment (Amendment XIII) had to be passed later by way of making slavery illegal on a permanent and universal basis. But for the time being the reserve powers of the President were brought into operation and they proved sufficient for the exercise of this new central jurisdiction.[12]

[12] See Binkley—*op. cit.*, pp. 114-134.

Just as Lincoln, a Republican, had acted against the principles of his party in regarding the presidentship as an independent office and in not acting as a pliable tool in the hands of the Congress, so also Theodore Roosevelt,[13] another Republican, did not see eye to eye with the members of his party in regard to the position and powers of the President. He regarded himself as a President of the Jackson-Lincoln type. He enunciated his views in this respect very clearly and emphatically in the autobiography which he published after his retirement from office. These views tally eaxctly with the ideas of the Democratic Party regarding the office of the President. As President, he observes, he acted "upon the theory that the executive was limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by Congress under its constitutional powers. My view was that every executive officer, and above all an executive officer in high position was a steward of the people....I declined to adopt the view that what was imperatively necessary for the Nation could not be done by the President unless he could find some specific authorization to do it...Under this interpretation of excutive power I did and caused to be done many things not previously done

[13] He was elected Vice-President of the United States in 1900 but six months after the inauguration the President, Mr. McKinley, was shot by an anarchist and he died eight days later. So Roosevelt became President and was re-elected as such in 1904.

by the President and the heads of the departments. I did not usurp power but I did greatly broaden the use of executive power."[14] Roosevelt was the high priest of "New Nationalism" in the United States. He succeeded in fostering this nationalism to a large extent through the application of his theory that the President was the steward of the people and not merely an officer to execute the laws of the Congress. It has been held by a large section of opinion for over half a century that while the Congress represented only particular groups of people, the President alone represented the nation as a whole. It was, therefore, for him, more than for any other factor of government, to cater to its interests and further its cause. Roosevelt appreciated this responsibility and tried to discharge it to the best of his ability.

Woodrow Wilson who became President four years after the first Roosevelt had retired from the White House, placed no doubt his emphasis on "New Freedom" as the latter had placed on "New Nationalism." But his "New Freedom" did not presuppose either the augmentation of State power at the expense of central jurisdiction or merely the limitation of the interference of government (Central or State) in the affairs of men. On the contrary his "New Freedom" could not be achieved without an increasing intervention of the government

[14] An autobiography, p. 389.

and the Central Government at that. If people in general were to feel free, the conditions of their life must not be allowed to be regulated by the selfish capitalistic and financial interests. They must be controlled to a great extent at least by the government. The Congress was not merely to look on while economic life of the people was being controlled by a small group of interested persons. It must intervene and direct the economic activities in the country so that the interests of divergent sections might as far as possible be harmonised. But the Congress, consisting as it was of members who represented only small sections of the people and might have no real appreciation of the interests of the country as a whole, must be guided and led by the President who alone represented the whole country.

When only twenty-three, Woodrow Wilson had been convinced that without Presidental leadership the administration would always remain in the rut. In 1879,[15] he submitted to Henry Cabot Lodge, editor of the International Review, a manuscript which was in due course published in that journal. In this paper he urged that the President's office should accommodate more and more to that of the Prime Minister in Great Britain. Under his direction legislative measures should be initiated in the U. S. A. Representing the whole

[15] Born in 1856.

nation, he was expected to have a clear appreciation of its needs and accordingly he was best fitted to take initiative in legislation. After making this suggestion for the first time in 1879, he returned to the question periodically. Only four years before his election as President, he enunciated his views afresh about this Presidential leadership in course of a few lectures on the American Constitution at the Columbia University, New York. There was a growing recognition in the country, he observed, of the fact that the President was "the unifying force in our complex system, the leader both of his party and the nation."[16] It was incumbent upon him on this account that he should act as the guide of the Congress in its law-making function. "The Constitution bids him speak[17] and times of stress must more and more thrust upon him the attitude of originator of policies."[18]

So Woodrow Wilson interpreted the constitutional position of the President in such a way as to make him the originator of Congressional legislation. It was by filling this role that he would find it possible to bring about the intervention of the Central Government in the economic activities of the country. The Federal Reserve System, *e.g.*,

16 See Constitutional Government, p. 60.

17 Section 3, Article II of the Constitution lays down that the President " shall from time to time give the Congress information of the state of the Union and recommend to their consideration such measures as he shall judge necessary and expedient."

18 Constitutional Government, p. 73.

which was set up in 1913, was virtually his handiwork. It was on his initiative and through his efforts that the Congress undertook legislation on the subject. It did not create a central bank but it created a system which provided for a good deal of centralisation in the control of banking and for the supervision of the United States Government in banking operations.

Anyhow it is not necessary to go very far to know that by a liberal interpretation of those clauses of the Constitution which confer powers upon the Congress and the President, the authority of the Central Government has been considerably augmented and its jurisdiction immensely widened. It is true that such interpretation has been subject to approval by the Supreme Court of the United States. And, as it is shown in another chapter, such approval has not been given in a uniform manner or on a uniform basis. But still the fact remains that as a result of liberal interpretation of the powers of the Congress and the President, centralisation has grown apace in the United States.

CHAPTER IX

DEVELOPMENT OF CENTRAL DEPARTMENTS

The functions, which were definitely delegated to the Central Government, were originally very simple in character. The responsibility taken by this Government on their account could be easily discharged. The establishment which had to be maintained for the purpose was comparatively small, and even insignificant. The territory then covered by the United States was small in extent and the total population of the Union was only four million. A small and simple establishment could certainly cope with such territory and population. Besides in 1789 and for decades afterwards, it was an article of political faith with most people that government was only a necessary evil. It should interfere with their affairs as little as possible. It should only interpose its authority when one individual was trying to undermine the liberty of another. In other words the government was to be concerned only with maintaining order within and protecting the frontiers from without. Because of the prevalence of this doctrine of *laissez faire*, a doctrine which was especially emphasised by statesmen like Jefferson, [1]

[1] What was necessary, observed Jefferson in his first inaugural in 1801, was "a wise and frugal government, which shall restrain men from

the Central Government had to bear only a light responsibility for years.

Gradually, however, things began to change. Both territory and population began to grow and multiply and attitude towards government was also altered under the stress of circumstances. Even today, in the United States, the prevalent theory of politics is no doubt individualism. It was through individual initiative and enterprise that the country had been developed both extensively and intensively on such a gigantic scale within a short period. Necessarily, inspite of all pitfalls which the principle of *laissez faire* has been found to contain, people have still, as a rule, a pathetic confidence in individual initiative. Government control is still rather unwelcome in that country. But despite the strong roots which *laissez faire* succeeded in striking in the soil of the United States, it could not but be modified in practice to an increasing extent. Though the people wanted to keep the powers and functions of government within very limited proportions, they grew all the same from decade to decade.

When the federation was started on its career in 1789, the Central Government had only three departments apart from the office of the Attorney-General. They were under three Secretaries—(i)

injuring one another, shall leave them otherwise free to regulate their own pursuits of industry and improvement, and shall not take from the mouth of labour what it has earned."

Secretary of State, (ii) Secretary of the Treasury, and (iii) Secretary of War. The Post-office was not a "department" proper. [2] It was only a Bureau in the Treasury Department. The Attorney-General was included in the Cabinet no doubt from the time that this body began to meet. But the office [3] of this functionary was so small that it might better not be called a department. In fact the Attorney-General received a lower salary than the Secretaries and was not expected to be a full time officer of the Government. It is interesting to remember that it was not until 1814 that he was required to reside at Washington. [4]

The Central Government, set up in 1789, did not remain long as it had been organised in that year. Gradually new departments were created and old departments were expanded. Some of these departments grew almost automatically. As new territories were incorporated in the Union and as population began to multiply, these departments also had to be expanded to keep pace with these

[2] The Postmaster-General was only a Bureau Chief and could not be in the Cabinet. He was included in the Cabinet only during the Presidentship of Andrew Jackson. See H.B. Learned—The President's Cabinet, (1912), p. 220. In fact the Treasury also was not for long regarded as an "executive department." *Ibid.*, pp. 103-5.

[3] Provided by the Judiciary Act of 1789.

[4] John A. Fairlie—The National Administration of the United States, p. 166. The office of Attorney-General was really not organised as an Executive Department until in 1870 the Department of Justice was established.

territorial and population changes. The Department of Post Office for instance could not remain for long as small as it had been in the year of its creation as a Bureau. It had to meet the needs of an increasing population and to extend its activities to new territories. The personnel employed in this department consequently increased from time to time and before the Civil War broke out, the Post Office had developed into a large department whose employees were scattered over the whole Union.[5] A Government whose one department could employ so many men and in so many nooks and corners of the large Union, could not but inspire awe and respect in the mind of the people.

The Central Government was empowered by the new constitution "to raise and support armies" and "to provide and maintain a navy."[6] But at the start the Department of War was a very small concern, and that of the Navy was not created at all. Commercial States of New England were advocates of a strong navy and wanted a separate department "to provide and maintain" it. But the agricultural States of the South were opposed to any naval establishment. Thomas Jefferson, though a Southerner, appreciated the

[5] In 1789 the number of post offices was only 75. By 1829 it became 8,000 and the number of employees rose to 30,000. A corresponding increase was made in the mileage of post roads.

[6] Section 8, Article 1 of the Constitution.

necessity of a strong navy for his country, for otherwise, he knew it would not be possible to protect the United States commerce from the hands of the Barbary pirates. But neither he nor John Adams of Massachusetts who had made a special study of the subject was in the first Congress. So the Department of the Navy was not created in 1789. The Secretary of War was to be in charge as much of the army as of "such naval business as there might be."[7]

Gradually, however, it was brought home to the Government that for "the protection of the commerce of the United States against the Algerine corsairs," it was essential to build a sufficiently large fleet. Accordingly in 1794 the Congress provided for the building of several Government vessels. Meanwhile the French Revolutionary Wars also began in Europe and the maintenance of an honourable neutrality became a serious problem to the United States Government. The necessity of a strong fleet became increasingly felt and the proposal of a separate Department of Navy received assent from many quarters. Washington, in his last message to the Congress, emphasised the question of a navy in words which convinced many. "To an active external commerce," he observed, " the protection of a naval force is indispensable...it is in our experience

[7] Learned—*Op. Cit.* pp. 205-206.

that the most sincere neutrality is not a sufficient guard against the depredations of nations at war. To secure respect to a neutral flag requires a naval force organised and ready to vindicate it from insult or aggression."[8] When John Adams succeeded him as President in 1797, he, as it was expected, pushed the question more vigorously still and in 1798 the Department of Navy was created by the Congress.[9]

Since then the military affairs have occupied a very large space in the ambit of central authority. The standing army is a large one and the navy which is now attracting so much attention of the world has similarly become a huge concern. In addition to these two arms, the air force has also developed apace. This growth of the departments of defence could not but impress the mind of the people and inspire their respect and a confidence. That the Central Government was not a weak and rickety body, but really a very powerful agency of public authority, was brought home to the general body of the citizens in the Union.

Just as the old departments of the Central Government grew gradually in importance and personnel, so new departments in respect of new functions were added from time to time until to-day there are ten regular executive departments

[8] *Ibid.*, p. 209.

[9] *Ibid.*, p. 215.

in the place of three only in 1789.[10] We have seen already how in 1798 owing to a combination of circumstances the necessity and importance of a strong navy grew apace and a separate Department of Navy had to be created in that year. Then in 1849 was created the Department of the Interior. Some of the functions assigned to the department were formerly discharged through other departments, *e.g.*, the Department of State, the Department of War and the Department of the Treasury. The Department of the Interior also did not remain concerned with all of them for long. When other new departments were created, a few of these responsibilities were handed over to them. The Department of Justice, for instance, was created in 1869 and it absorbed some of the functions hitherto carried out by the Department of the Interior. While the latter had thus to part with some of its functions, it had to assume responsibility for some other new duties. The Bureau of Education was, for instance, established as an independent body in 1867 but two years later it was placed under the control of the Secretary of the Interior. Geological Survey was set up in 1879 under a Director and it also became incorporated in the Department of the Interior.

[10] Department of Navy was created in 1798, that of the Interior in 1849, that of Agriculture in 1889, that of Commerce and Labour in 1903. *Ibid.*, p. 6. Labour was later (in 1913) separated from Commerce and Labour and Immigration constitute now a separate department by itself.

The Department of Agriculture was created in 1889. One hundred years before it when the United States Government was first established, there was a talk as to whether the establishment of a central board of agriculture was urgent or not. Evidently some people were convinced that agriculture was a fit and proper subject for some kind of attention and supervision on the part of the Federal Government. But it is significant that Alexander Hamilton who was otherwise such a strong protagonist of the centralisation of public authority and power, did not regard agriculture as worthy of government supervision and control.[11] Any how nothing came out of the proposal to create a central board of agriculture in 1789. Attempts made from time to time after this also proved abortive.

Interest of a number of Government Officials in agriculture was, however, noticeable at times. Some of the United States Consuls, for instance, thought it right to bring new plants and breeds of animals from abroad and distribute them among the people. With effect from the year 1836 a change in the attitude of the Federal Government itself also became increasingly noticeable. From

[11] See the Federalist, No. 17. "The administration of private justice between the citizens of the same State, the supervision of agriculture and of other concerns of a similar nature, all those things, in short, which are proper to be provided for by local legislation," he observes, "can never be desirable cares of a general jurisdiction."

now on the Commissioner of Patents began officially to distribute packages of seeds of new plants among the people. In 1839 an appropriation was made for the purpose of supplying such seeds as well as for collecting statistics and carrying on agricultural investigations. The Patent Office through which this work was being done, was for years, incorporated in the Department of State. But in 1849 when the Department of the Interior was created, it was transferred to, and made part and parcel of, this new department.

In 1862 the Department of Agriculture was set up not as an executive department but still as an independent body outside the existing *executive departments*. The department thus created began gradually to grow and expand. Fifteen years later in 1877 it was thought necessary to add to it a Forestry Division and in 1884 a special Bureau of Agricultural Husbandry. In 1887 agricultural experiment stations had to be established under its aegis. The work of the department thus grew so extensively and so rapidly that in 1889 it was raised, in the fitness of things, to the rank of an "executive department."[12]

The Department of Commerce and Labour was constituted in 1903. It is true that in order to "regulate commerce among the several States" the Federal Government had to create some bureaus which, however, were scattered among the different

[12] J. A. Fairlie—*Op. Cit.*, pp. 220-22.

departments. But gradually as their work increased and their importance developed, it was felt that they should be integrated in one department. With the rise of industrialism the problem of labour had also attracted notice and in 1885 the Bureau of Labour had been organised in the Department of the Interior. Three years later in 1888 the duties of this Bureau were transferred to a Department of Labour created outside the executive departments. This department was amalgamated with the Department of Commerce in 1903 and the combined department became a full-fledged executive department under a Secretary who was included in the Cabinet.[13] Ten years later problems of labour became more complex and demanded much more attention. In consequence of that fact the Labour Department was separated from Commerce in 1913. Since 1917 immigration also has become the subject of increasing government control. Legislation to restrict immigration was adopted in that year and it was modified and made more stringent in 1924. Now the two departments[14] of Labour and Immigration are placed under the same Secretary.

Outside the ten executive departments which have been described above, a large number of

[13] *Ibid.*, pp. 230-33.

[14] Miss Perkins has been Secretary during the second administration of Franklin Roosevelt. She is the first Woman Secretary in the United States.

Commissions and Boards have been set up, from time to time, to deal with the exercise of new responsibilities which the Central Government have felt constrained to assume. The number of these Boards was twenty-eight in 1929. During the last few years of Roosevelt administration mony more have been added to the list.[15] The first of the Commissions to be referred to here is certainly the Inter-State Commerce Commission. It was established under the Inter-State Commerce Act passed by the Congress in 1887. The Congress was empowered by clause 3 of Section 8 of Article 1 of the Constitution to regulate commerce among the several States. Now the railways which had been laid so rapidly and widely in the United States were a most important instrument of inter-state commerce. For years, however, they were regulated by State Railroad Commissions. But in 1886 the Supreme Court of the United States declared that the regulation of railway charges by a State law was not valid on the ground that although such charges might be applied within the limits of the State concerned, actually the transportation would involve a portion at least of inter-state commerce. So the State

[15] Some were abolished as well and their functions were transferred either to a relevant executive department or to some new Board or Commission. The United States Shipping Board, *e.g.*, was abolished in 1933 and its functions were handed over to the Department of Commerce, Similarly Federal Farm Board also was abolished,

Railroad Commissions administering State laws failed to cope with the responsibility of regulating the railways.

Accordingly the Congress had to step in, and it passed in 1887, as pointed out already, the Inter-State Commerce Act under which the Inter-State Commerce Commission was established. It was to see that the rates were reasonable and just, that rebates and discrimination between persons and places were not resorted to, that pooling and traffic agreements were banned, and that as a rule more was not charged for a shorter than for a longer distance. The powers vested in the Commission by the Act may thus appear to be reasonably wide. But they were whittled down by judicial decisions. In consequence of that, fresh laws had to be passed in 1906 and 1910, and again in 1920. The Commission is to-day entrusted with a heavy responsibility—that of supervising the largest transportation system in the world. The duties which are entrusted to this body are numerous. The rates which the different companies may charge for freight are for instance subject to its approval. The Commission has again either to prescribe the conditions or approve of them in regard to the sums which they may borrow and the securities which they may sell. It is for the Commission again to make arrangements which may appear desirable to itself for the purpose of relieving congestion in traffic.

Further, it has to make similar arrangements for locomotive inspection so that the safety-standard may be duly maintained.

The next Commission which we may take up for consideration is the Federal Trade Commission which was established in 1914, under the Federal Trade Commission Act passed by the Congress in that year under the inspiration of President Woodrow Wilson. He wanted to curb the abuses which had crept into the industrial organisation in the country. To this end already some steps had been taken in previous regimes. In 1890, for instance, the Sherman (Anti-Trust) Act had been passed by the Congress to prevent trusts and combinations from ousting competition and defrauding the public by the enhancement of prices. We need not enter into the history of the working of this Act. It is enough to point out here that as a result of a judgment of the Supreme Court in 1895 (Sugar case) the Act virtually became abortive. Ten years later, however, in 1905 the decision was practically reversed (Swift case) and as a result some combinations were dissolved.

When Wilson became President, he felt that some further measures were necessary to prevent unfair methods of competition among companies and stop effectively their merger into trusts. Accordingly, as we have seen, the Federal Trade Commission Act was passed in 1914 at his instance. Its duties are many in number and

mostly semi-judicial in character. It is to investigate into general business conditions and particularly into those relating to unfair methods of competition, restraints of trade, and monopoly. It is to see that unfair methods of competition in inter-state trade are prevented. The orders, however, which it may issue are not punitive. Unless affirmed by the United States Circuit Court of Appeals, these orders may be violated without any penalty attaching to the violation. The procedure according to which the Commission happens to work is this. Any person may, by a simple letter, complain that a particular company was pursuing unfair competition in certain respects. The Commission will take notice of this complaint and hold an investigation. It may call a conference at which the representatives of the industry concerned may be invited. Here the matter may be talked over and an opportunity given to the company, against which the complaint has been lodged, to correct its methods. Otherwise a decision will be arrived at. If the decision is not obeyed, the matter will be carried to the U. S. Circuit Court of Appeals. The Commission consists of five members, appointed for a term of seven years each. It works through its subordinate offices which are spread over the country.[16]

[16] It has fourteen sub-divisions and four branch offices at Sanfransisco, New York, Chicago, Seattle.

We may now take up another instance, that of the Federal Reserve Board which was set up in 1913. The Congress was persuaded to pass the Bank Act two years after it had begun its career in 1789. This was done at the instance of Alexander Hamilton who had made a report to that effect. The United States Bank so chartered remained in existence until 1811 when it was discontinued, Five years later, however, it was re-chartered by the Congress and remained in existence until 1836 when its operations ceased. Since then there was no United States Bank. But since the seventies there had been an agitation in certain quarters for establishing some kind of a bank under the charter of the Central Government. But this agitation did not bear fruit until Woodrow Wilson took up the question after his election to the Presidency. Carter Glass[17] was then the Secretary of the Treasury and after consultation with him and some business and banking experts, Wilson became convinced that it would neither be possible nor wise to set up a central bank in the true sense of the term. The constitutional organisation of the country would be unsuitable for the establishment and operation of such a bank. It was settled accordingly to organise a system of supervision and control which would be in keeping with the federal system of the United States. The Bill which was

[17] Now a Senator from Virginia. A Democrat but opposed to Roosevelt.

framed at the instance of Wilson provided for a federal reserve system under which central supervision would be combined with decentralisation in actual operation. The Union was divided, under the Act, into twelve districts. In each such district or region there is a federal reserve bank whose capital stocks and reserves are furnished by the member banks and whose management is vested in a board of nine directors six of whom are elected by the member banks. Then at Washington there is the Federal Reserve Board appointed by the President. It is a supervisory body and not actually an operating body. But still it has far-reaching authority. Again, so far as the Reserve Banks act as the agents of the Federal Government, they are directly under the control of the Secretary of the Treasury.

We have discussed above, and that also only cursorily and in outline, the constitution and function of three bodies which have been set up in the Central Government outside the ten executive departments. There are many more of such commissions and boards which it is not necessary here to discuss. But from what has already been described it will appear as to what a leviathan the Central Government has become in course of the one hundred and fifty years of its existence. From the "one department of foreign affairs" it has grown into the gigantic size of to-day. This brings out into relief the growth of centralisation which has

been brought about during the last one century and a half.[18]

[18] The gigantic size which an "executive department" has assumed to-day may be illustrated by the number of bureaus of which one such department happens now to consist. We are taking the case of the Department of Agriculture. Its bureaus are :

(*i*) Bureau of Animal Husbandry.
(*ii*) Bureau of Plant Industry.
(*iii*) Forest Service.
(*iv*) Bureau of Biological Survey.
(*v*) Bureau of Entomology.
(*vi*) Bureau of Plant Quarantine.
(*vii*) Food and Drug Administration.
(*viii*) Bureau of Chemistry of Soils.
(*ix*) Bureau of Public Roads.
(*x*) Bureau of Agricultural Economics.
(*xi*) Office of Experiment Stations.
(*xii*) Extension Service.
(*xiii*) Bureau of Home Economics.
(*xiv*) Weather Bureau.
(*xv*) Grain Futures Administration.
(*xvi*) Bureau of Agricultural Engineering.
(*xvii*) Bureau of Dairy Industry.
(*xviii*) Agricultural Adjustment Administration.

The Central Government apart from the "executive departments" has again to maintain altogether 86 establishments including the Commissions and Boards. See a paper on Organisation of the Executive Branch of the National Government of the U. S. by the Brookings Institute, American Political Science Review (Vol. xxvii, No. 6), Dec., 1933, pp. 942-56.

CHAPTER X

The Supreme Court and the Constitution

We have seen that a balance of power between the Federal and State Governments was created by the Constitution of 1789. The question now is as to how it was to be maintained. When the two governments were set up as the agents of the sovereign people, commissioned with distinct duties and endowed with distinct powers, it was but reasonable and proper that there should be some authority to see that the line of demarcation between them was not overstepped, that one government did not intrude upon the jurisdiction of the other. It is true that the sovereign people would be there to watch the activities of their agents and issue final decisions as to the controversies which might arise as to their respective limits of power. But the sovereign people would be too unwieldy a body to be consulted on all occasions. The procedure according to which this body would work would also be too complicated and too intricate to be brought into requisition at all times. The Government of a State might claim certain power as its own but the Central Government might dispute this claim and regard the power as belonging to itself. Now if the people of the United States were alone in a position

to settle this dispute, they would do it only by so amending the Constitution as to make it definite and clear that this power belonged to this government and not to that. The amendment of the Constitution, however, would not be something to achieve easily and immediately. It would involve long delay and considerable uncertainty. So some other institution more handy and more certain was necessary to act as an umpire between the different authorities in the federation.

There might be disputes between one authority and another (*i*) when the Government of a State would encroach upon the domain of the Federal Government, (*ii*) when one State would be accused of intruding upon the field of authority of another, and lastly (*iii*) when the Federal Government would be guilty of transgressing the boundary line and making an invasion upon the field of jurisdiction of the States. The Constitution left the people in no doubt as to the authority which would settle the disputes of the first two kinds. It declared that the Constitution, and the laws and treaties of the United States made thereunder, must be regarded as the supreme law of the land and the judges in every State would be required to uphold them.[1] In case any of the provisions of a State Constitution or a State law was inconsistent with the provisions of either the United

[1] Article VI of the Constitution.

States Constitution or the laws and treaties of the United States made in pursuance of this Constitution, then the State Constitution or the State law, as the case might be, must be declared by them to be void to the extent that it was so inconsistent. In other words when a State Government would arrogate to itself any power not left to it by the Constitution and thereby create a dispute, the State courts were commissioned to declare the State action null and void and settle the dispute to that effect.

We have spoken so far only of the duties of the State judges in this respect. Had not the courts of the United States any duty in this regard? Certainly they had. All the judicial officers of the United States were bound by oath or affirmation to support the Constitution.[2] So they were expected to set at naught the action of any particular State Government, when it was found inconsistent with the provisions of the Constitution. Secondly by Section 25 of the Judiciary Act of 1789 the Supreme Court was empowered to hear appeals in all cases in which the final State court made a decision which was regarded as inconsistent with any provision of the United States Constitution or of the laws and treaties made by the United States in pursuance of it. So if a State Government made an invasion

[2] Article VI of the Constitution.

upon the provisions of the Constitution by passing a certain law and if the State courts did not rectify the mistake, the matter would come before the Federal Supreme Court for final disposal.

Then as regards the disputes between one State and another the Supreme Court of the United States was definitely empowered by the Constitution to take cognisance of them. If one State encroached upon the domain of another, the Supreme Court would be approached and its decision would settle the dispute once for all. The question would now arise as to what would happen if the Government of the United States intruded upon the jurisdiction of the States. Suppose the Congress passed a law upon a subject which was not handed over to it by the Constitution and thereby it legislated upon a matter which was not within its own competence but was within the competence of the State Governments. Then how would this position be corrected? The obvious answer is that the federal courts would be the proper authority to decide whether the action of the Congress was really inconsistent with the Constitution and if inconsistent, to declare it null and void. The judges of these courts are bound by oath or affirmation "to support this Constitution" and as the encroachment on the part of the Federal Government would undermine this Constitution they must take judicial notice of it.

But this point of view has always been opposed by a section of the people. This section has held the opinion that the courts have no jurisdiction in this matter. It is for the Congress itself to judge if any of the measures which it is called upon to decide and adopt is *ultra vires* the Constitution or not. Those who sponsor this view-point refer to the fact that while in regard to the State constitutions and laws the State Judges were definitely commissioned with the duty of declaring them null and void to the extent that they were inconsistent with the provisions of the United States Constitution and the laws and treaties of the United States made in pursuance of this Constitution, no such duty was expressly conferred upon the courts, federal or State, regarding the laws passed by the Congress. If the fathers of the Constitution had any intention that the central laws should be treated in the same way as the laws and constitutions of the States, certainly they would not have been silent in the former case and express and definite in the latter.[3]

Notwithstanding this point of view, however, the courts have always taken cognizance of the

[3] The objections raised to the courts exercising the right to nullify Congressional laws have been summarised by Professor C. A. Beard in the first 13 pages of his monograph on "The Supreme Court and the Constitution (1912)." In the rest of the book he has given a reply to the objections.

disputes regarding the constitutionality or otherwise of the laws passed by the central legislature. It is true that the judges have not been definitely commissioned by the Constitution to declare *ultra vires* laws passed by the Congress when they are in conflict with the provisions of the Constitution. But as they are bound by oath or affirmation [4] to support this Constitution, it was not necessary that they should be specifically commissioned to declare void a law passed by the Congress on the ground of its inconsistency with the provisions of this document. If the Constitution was to be "supported," the law of the Congress which was *ultra vires* this Constitution must be turned down as no law. So although the fathers had not pronounced themselves expressly and definitely in this matter, they were not likely to have any doubt as to the jurisdiction of the federal courts over the laws passed by the Congress. If they had any such doubt at all, they would not have commissioned the judges to suppport the Constitution. It stands to reason to think that they expressed themselves more definitely in regard to the State laws and State constitutions only because, in the light of the traditions of the country, the State Governments were more expected to intrude upon the central jurisdiction than the Central Government was expected to do upon State jurisdiction.

[4] Article VI of the Constitution.

Secondly, it has been pointed out that it does not matter whether the fathers of the Constitution wanted the courts at all to declare a central law invalid on the ground of its inconsistency with the Constitution. Irrespective of their wishes the courts would have this power. The fathers of the Constitution made it the supreme law in the country. Necessarily any law passed either by a State legislature or by the central legislature, which is in conflict with this supreme law, must be declared void to the extent that it is in such conflict. The question is as to who was to declare it at such. Certainly it was the function of the law courts and of no other institution. The law courts were there only to see as to which action was according to law and which not. As a matter of course, therefore, they were to see whether any action of the central legislature was in conofrmity with the supreme law of the land or not. This was, in other words, an inherent power in the courts of law. "The power of the courts to decide upon the constitutionality of laws," observed Gouverneur Morris in 1802, "is derived from authority higher than the Constitution; it is derived from the constitution of man, from the nature of things, from the progress of human affairs."

The exercise of the inherent power of the courts of law in safeguarding the provisions of the fundamental law of the country became more

necessary and urgent in view of the fact that a bill of rights was appended to the Constitution. When this document was first framed and adopted, it did not contain any such bill. But at the time it was submitted for approval to the State Conventions, a demand for such a bill of rights became insistent. Accordingly after the Constitution was put into operation, several amendments were adopted in 1790 by way of providing for such a bill. Now the bill of rights is not a mere recommendation which the legislatures might act up to or go back upon as they pleased. They constitute a mandate which has to be followed. If the courts of law have no authority to nullify an enactment of the Congress on the ground that it violates a provision of the bill of rights as embodied in the Constitution, then of what use could it be ?

The traditions of the United States both before and after the War of Independence also pointed to an exercise of supremacy by the courts over legislative enactments. In colonial days the Privy Council in London systematically exercised the power of reviewing colonial legislation, which was analogous to the power which the Supreme Court thought it right and proper to assume after the formation of the federal union. It is true that the Privy Council declared colonial acts null and void not merely because they were in conflict with the fundamental law of the colony concerned but also on other grounds. But still it is a fact that

measures adopted by colonial legislatures were turned down by the Privy Council on the ground that they were inconsistent with the provisions of colonial charters, or acts of the British Parliament or the common law of England. One instance of such disallowance may be cited here. In 1727 the Privy Council acting as a final court of judicature decided, in the case, *Winthrop v Lechmere*, that an act of the colony of Connecticut regarding the division of the property of an intestate among his children was null and void "as being contrary to the law of this realm, unreasonable, and against the tenor of their charter." It was definitely of opinion on this ground that "the province had no power to make such a law." [5]

In colonial days power of review was not again confined to the Privy Council as the highest court of judicature. Now and again the colonial courts also did not hesitate to exercise this power. At times they even went to the length of refusing to give effect to an order of the King or an act of the British Parliament as contrary to their fundamental rights. One instance may be cited here. In 1738-39 the Superior Court of Judicature of Massachusetts was called upon to decide a case, *Frost v Leighton*. Though Frost had valid title to a piece of land, His Majesty's agents claimed the right, under a license granted by the Crown,

[5] C. G. Haines—The American Doctrine of Judicial Supremacy (2nd Ed.), pp. 49-50.

of cutting trees grown on that estate for the royal navy. Frost brought an action for trespass against the King's agent and the lower court awarded damages to Frost for the trees which had been cut. The matter was carried on appeal to the Superior Court, as mentioned already. This Court affirmed the decision of the lower tribunal.[6] The people of the colonies became accustomed, by such decisions on the part of the Privy Council as well as the local courts, to the fact that the powers of the legislatures were not unlimited and that the orders of the executive were not to be unquestioned. Both must be subject to review by the courts and if found contrary to fundamental laws and rights, they were to be turned down.

The tradition to which the people had become accustomed in the colonial days in this respect was further strengthened by the decisions of the courts of the different States before the inauguration of the federation. The first and the most important decision which should be referred to in this connection was that issued in the case *Holmes v Walton*. The case was briefly this: In 1778 an act was passed by the legislature of New Jersey, providing for the seizure of goods belonging to the enemy (Great Britain).[7] It further provided that cases which might arise out of such seizure of goods would be tried by a jury of only six men and that

[6] *Ibid*, p. 56.

[7] The War of Independence was then going on.

there would be no appeal against its decision. Actually, however, the case which has been referred to above and which had arisen out of the enforcement of the act was carried on appeal to the Supreme Court of the State. It was argued before this Court in 1779 and the judgment was issued in 1780. In this judgment the Court found the act to be inconsistent with Section XXII of the Constitution of 1776, which provided that the right of trial by jury would remain confirmed as "a part of the law of this colony without repeal forever." As the act had been passed in contravention of this provision, the Court declared it void.[8]

Another case, *Bayard v Singleton*, which was decided by the courts of North Carolina in 1787 may be considered here. An act, known as the Confiscation Act, had been passed by the legislature of North Carolina by way of protecting all persons who had purchased lands, which had originally belonged to Tory owners (loyalists) but which had been forfeited by the Government and sold by State Commissioners. The act provided that the sale and purchase of these forfeited lands were not to be questioned in any court of judicature. If any suit was instituted in this regard in any court, the latter was required to dismiss it on motion. Now Bayard actually brought a suit in May, 1786

[8] *Ibid*, p. 92.

to recover a property which had been sold by the Commissioners. The court found the provisions of the act inconsistent with those of the constitution of the State. But in order to avoid a conflict between the act of the legislature and the constitution of the State, it delayed a decision for about a year and attempted to secure a compromise. But for such an attempt it met with nothing but harassment at the hands of the legislature. In 1787 it took up the case and was much impressed by the arguments of the counsel for the plaintiff, James Iredell. It therefore proceeded to deal with the suit inspite of the provision of the act that the court must dismiss it on motion. In the course of their judgment, the judges observed "that the obligation of their oaths, and the duty of their office required them in that situation to give their opinion on that important and momentous subject." They decided that the act of the legislature was invalid on the ground of its conflict with the constitution of the State which the court must uphold as the fundamental law.[9]

We have cited above only two cases illustrating the power of review which the State courts claimed and exercised over legislative enactments. Other instances may also be cited. In any event it was a fact that the people had become accustomed, as much in the colonial days as during the fifteen

[9] *Ibid*, pp. 112-18.

years immediately preceding the federation, to the declaration by judicial courts of acts of legislatures as null and void. After the inauguration of the new regime in 1789, the question as to whether the federal courts could turn down a law passed by the Congress remained an open one. It is true that the traditions, already created, pointed to the exercise of jurisdiction by the federal courts over Congressional laws. But still it cannot exactly be said that, before the disposal of the famous case, *Marbury v Madison*, by Chief Justice Marshall, the doctrine of judicial supremacy was fully established.

As early as 1792 a case involving the constitutionality of an act of Congress came up before the federal courts. The act was declared by the Circuit Courts as *ultra vires*. But before the Supreme Court could issue its decision, the act in question had been modified. So it could not be established on the authority of the highest federal tribunal that an act of Congress could be declared unconstitutional and therefore invalid. The case is known in American legal and constitutional history as *Hayburn's Case*. Its history may be narrated in brief. The Congress passed an act by way of regulating the claims to invalid pensions. It devolved upon the judges of the Circuit Courts the duty of receiving and determining upon the applications for such pensions. These judges again were to perform this duty, subject to

review by the Secretary of War and by Congress. In the New York Circuit the justices were of the opinion "that neither the legislative nor the executive branches can constitutionally assign to the judicial any duties, but such as are properly judicial and to be performed in a judicial manner." So virtually this Court declared the act of Congress unconstitutional. But the justices all the same did not refuse the duty which was devolved upon them by the act. They decided to carry on with the work, not as justices of the Circuit Court but as commissioners. In the Pennsylvania Circuit, however, the justices went to the logical extent and refused an application for an award. They also addressed a letter to the President of the Republic, in which they delineated the reasons because of which they could not undertake the work devolved upon them by the Congressional statute. In the first place, they said, the business devolved upon them by the act was not of a judicial nature and was not a part of the duties which the Constitution had vested in the courts of the United States. In other words they themselves would be acting unconstitutionally if they entertained the duties assigned to them by the act. Secondly, if the Circuit Court proceeded with this work at all, it might be revised and controlled both by the legislature (Congress) and by an officer in the executive department. Such revision and control were,

however, inconsistent with the independence of the bench and therefore again inconsistent with the Constitution of the United States.

The Attorney-General of the United States appealed to the Supreme Court for a mandamus so that the judges of the Pennsylvania Circuit might be compelled to act on the petition which Hayburn had submitted to them for pension. The justices of the Supreme Court, however, refused to act on the motion of the Attorney-General. But on a motion presented on behalf of Hayburn, the Court observed that it would take up the case in its next session. Meanwhile, however, the statute was modified and the case, as pointed out already, fell through in consequence.[10]

Between 1792 and 1803 when the judgment of the Supreme Court in the case of *Marbury v Madison* was issued, no other case was dealt with by the Supreme Court or for the matter of that by any other federal court in which an act of Congress was declared void. Here and there opinions were expressed no doubt by judges that the Congress deriving its jurisdiction from the Constitution was not entitled to pass any measure not consistent with the provisions of the Constitution. If it did pass any such measure, that must be declared as no law. But such opinions could not be regarded as authoritative enough. So *Marbury*

[10] *Ibid*, pp. 173-75.

v Madison[11] was the first case in which it was authoritatively laid down by the Supreme Court that an act of Congress was subject to review by the federal courts.

President Adams, before leaving the White House on the completion of his term as President, had appointed William Marbury to the office of justice of the peace in the District of Columbia. The appointment was confirmed and the commission was signed and sealed but not delivered to the appointee. This was obviously because of an oversight. But when Jefferson was installed as President and Madison as Secretary of State, the commission was revoked. Marbury now applied to the Supreme Court for mandamus upon the Secretary of State for the delivery of his commission. Now under the Judiciary Act of 1789 the Supreme Court was empowered to issue such writs of mandamus to persons holding office under the United States. John Marshall, the Chief Justice, found that the Act to this extent was inconsistent with the Constitution of the United States. The question, therefore, was whether an act which was repugnant to the Constitution could become the law of the land. The decision of the Court made through the Chief Justice was that to the extent it was so repugnant it could not be the law of the land. It must be declared void by the court of law.

[11] Cranch 137.

In course of his judgment, he observed, "The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any time be passed over by those intended to be restrained?" Again he says: "The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its nature illimitable." But the framers of every written constitution "contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be, that an act of the legislature, repugnant to the Constitution, is void." Now "if an act of the legislature, repugant to the Constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be no law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in

theory ; and would seem at first view, an absurdity too gross to be insisted on." In fact "it is the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide the operation of each."

The judgment convinced many that the courts had the right and duty to declare void those acts of Congress which were inconsistent with the Constitution. But some continued sceptical about this power of review on the part of the courts of law. Fortunately during the first eighty years of the federation there were only four instances of Congressional law being turned down by the courts. It is also important to remember that after the case, *Marbury v Madison*, was decided, there was the long gap of fifty years during which the courts did not exercise any such jurisdiction. If by such reviews the courts frequently nullified Congressional laws, opposition to judicial supremacy would have gained more strength and momentum, and the Supreme Court on this account would have been unpopular in the country.



CHAPTER XI

The Supreme Court and the Constitution

(Continued)

We have seen in the previous chapter that during the first eighty years of the federation only four statutes passed by the Congress were declared null and void by the Supreme Court. But later this forbearance on the part of the Court became less and less noticeable. By 1888, it has been calculated, as many as nineteen acts of Congress were invalidated by the federal courts. By the same year the number of acts of State legislatures similarly invalidated by them rose to one hundred and twenty-eight.[1] It was not again merely in respect of the measures which the federal courts nullified that their influence and power over the making of laws in the United States were asserted and felt. The legislatures, cautioned by the invalidation of a few of their statutes, would take proper care not to go in for any enactment which might not be approved of by the courts and which might become void in consequence. The influence of the Supreme Court in fact became gradually dominant in the field of legislation. It virtually constituted itself into a super-legislature

[1] C. G. Haines—*Op. Cit.*, p. 401.

which might either turn down the decision of the proper legislative body or give it a new direction and a new character.

The judges who exercised this supremacy over the law-making authority of the legislatures were not expected to interpret the Constitution uniformly in the same way from decade to decade and assume in consequence the same attitude at all times towards federal as well as State legislation. It is true that the most pre-eminent virtue of a judge is impartiality. He must interpret and apply the law of the land as impartially as possible. The conditions of service of the federal judges generally and those of the Supreme Court particularly are also not unfavourable to the exercise of such impartiality. They are appointed by the President with the advice and consent of the Senate.[2] But once appointed, they are independent of both. They hold their office during good behaviour[3] and cannot be removed except by impeachment. But it is not enough that the external conditions are favourable for the exercise of impartiality. The internal conditions are by their very nature antagonistic to the judges being so impartial and impersonal in their decisions. There are many ordinary statutes in the application of which the judges may easily become impartial if only they choose

[2] Section 2 of Art. 11 of the Constitution.

[3] Section 1 of Art. 111 of the Constitution.

to be independent of outside pressure. But in the matter of interpreting the Constitution no standard method can be insisted on. The training, upbringing, political affiliation and social outlook of the judge are factors to be reckoned with. Even unconsciously a judge interprets the provisions of the Constitution only in the light of his own ideals and principles. The bill of rights which was appended to the Constitution of the United States complicated the matter all the more. Unwittingly a United States judge happens to read his own meaning, according to his political and social outlook, in the words used in the Constitution. Not unoften again the judge reads his own meaning in the provisions of the Constitution not unconsciously but deliberately and out of a set purpose.

It was because of these facts that the attitude of the Supreme Court of the United States towards constitutional questions changed from time to time according to the changing composition of the bench. Two facts should be remembered in this connection. The first is that only in rare circumstances a judge would be chosen from outside the party in power.[4] A federalist President like John Adams would not certainly go out of his way to nominate a republican candidate

[4] Edward Douglas White was a Democrat and was appointed an Associate Judge of the Supreme Court in 1894. He was promoted to the Chief Justiceship by the Republican President Taft in 1910.

to the bench of the Supreme Court. Nor would a democrat of to-day usually go outside his party for recruiting a judge either for the highest or for an inferior bench. Besides, a judge, particularly the Chief Justice, is appointed not only from the party but not unoften for political reasons. The Chief Justices, Jay, Ellsworth, Marshall, Taney, Chase were all appointed not because of their qualifications which some of them did not possess to the requisite degree, but because they were safe men from the party-point of view.[5] The second fact is that there is no age-limit for the judges. They may remain in office as long as they happen to live,[6] and judges in the United States not unoften live to good old age.[7] In consequence of these facts, the bench of the Supreme Court, once it takes up a particular complexion, does not change it rapidly.

The bench of the Supreme Court filled by federalist judges in and before 1801 continued to be federalist in outlook and principle long after the federalists had lost their influence in the executive and legislative branches of the

[5] See Warren—The Supreme Court in United States History, Vol. III, p. 129.

[6] They may retire now on full pension at seventy. But they do not prefer as a rule to retire.

[7] Chief Justice Marshall died in harness in 1835 at 80, Chief Justice Taney in 1864 at 88, Chief Justice Fuller in 1910 at 77, the present Chief Justice (Charles Hughes) is 78.

Central Government. In fact the bench remained under federalist control until the death of Chief Justice Marshall in 1835.[8] Similarly for about thirty years from the death of Marshall the bench continued to be *democratic* in composition. This was because of the fact that the vacancies both in the Chief Justiceship as well as in five Associate Justiceships were filled by the democrats when they were in power in the thirties. Similarly during and after the Civil War the bench, constituted by republicans, remained republican in complexion and outlook for years.

When Marshall and his federalist colleagues dominated the bench of the Supreme Court, it constituted a great centralizing force in the country. Judgments issued by Marshall were lucid as well as masterly in character. But they do not appear merely as the exposition of the constitutional law of the country by a learned judge but they appear in an equal degree as the opinion of a great statesman whose motive was not merely to deal out justice but to ensure and even to strengthen the Union which had been formed by the wise fathers but which required constant nursing at sympathetic hands. Marshall did not go out of his way to twist the meaning

[8] Joseph Story who was apointed an Associate Judge in 1811 by the Republican President Madison was a Republican. But he became inured to the views of Marshall.

of the provisions of the Constitution to gain his end. But it appears to a reader of his famous judgments that he was conscious of the end which he had in view and this end he subserved by explaining the provisions of the Constitution in his own way, without twisting them no doubt, but still in his own way.

"The completest exposition by Marshall of his constitutional creed on the side of nationalism," observes Professor Corwin,[9] "is his celebrated opinion in *McCulloch v. Maryland*."[10] We have seen in a previous chapter that Hamilton was the first statesman to formulate most clearly and definitely the doctrine of implied powers. In this case Marshall gave judicial sanction to this interpretation and helped thereby in enlarging central jurisdiction and widening central authority. In 1816 the Bank of the United States had been revived under a new charter. It opened a branch at Baltimore. The legislature of the State of Maryland, in which Baltimore is located, passed, however, a law imposing a tax upon all banks or their branches operating in Maryland but not chartered by its legislature. The Baltimore branch of the Bank of the United States refused to pay the tax and the case in question arose out of this refusal. It was carried on appeal to the Supreme Court of the United States and

[9] Twilight of the Supreme Court, p. 7.
[10] 4 Wheaton, 316

Marshall issued the judgment on behalf of the Court. This was in favour of the United States Bank. The Maryland law was *ultra vires* the Constitution of the United States and therefore void. It had been argued that the Congress which had been awarded only enumerated powers by the Constitution had no valid right to establish the Bank, for which this Constitution had made no provision. But Marshall observed, "we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but which consist with the letter and spirit of the Constitution, are constitutional."

In *Cohens v. Virginia*[11] which was decided two years later in 1821 and in which also the decision was given by Marshall, the judgment dip not indeed extend the jurisdiction of the central legislature or the central executive but it authoritatively announced the jurisdiction of the Supreme Court of the United States and strengthened the

[11] 6 Wheaton, 264.

Union by emphasising the fact that under the Constitution the laws, treaties and public acts of the United States were the supreme law of the land and the judges of the States were bound by this supreme law irrespective of the provisions of the State constitutions and laws. The facts of the case were these: The Congress authorized the corporation of the city of Washington to establish a lottery, the proceeds of which were to be used for municipal purposes. Some of the lottery tickets which were issued under an ordinance of the municipality were sold in the State of Virginia. A law of this State had, however, prohibited such sale. The borough court of Norfolk which was the highest State court for the purpose had upheld the State law and prohibited sale of tickets in the locality. An appeal was made against this decision in the Supreme Curt of the United States. The Counsel for the State of Virginia argued that the decision of the borough court was in order. His arguments were that in the first place the lottery law was not a law of the United States but only a municipal ordinance and consequently the State law, when inconsistent with it, did not become invalid. Secondly, in this case the State of Virginia was a party and in consequence of this fact the Supreme Court had no jurisdiction (*vide* the XI Amendment). Thirdly, it was contended that the Supreme Court of the United States had the

right to hear cases brought on appeal from the inferior federal courts but not from the State Courts. In other words section 25 of the Judiciary Act of 1789 which had provided for such appeal was invalid. Chief Justice Marshall put a quietus to such pretensions in his judgment in this case.

The Supreme Court which strengthened the Union and widened the jurisdiction of its Government by federalist interpretation of the Constitution during the period of Marshall's Chief Justiceship, changed its attitude when its bench became differently composed after 1835. Under the leadership of Chief Justice Taney the Court became the exponent of what has been described as "dual federalism." Its object in view was no longer to strengthen the Union which had been set up in 1789, far less to widen the jurisdiction of its Government. It was only to maintain intact the system which the fathers had reared. It would maintain the balance of power as it had been created but it would not see it weighted in any way in favour of the Union. The most famous case dealt with by the Supreme Court during the Chief Justiceship of Taney was *Dred Scott v. Sandford.*[12] It was decided in 1857. It illustrates two points. In the first place it brings out the fact that as in the case of Marshall so in the case of Taney a judgment

[12] 19 Howard, 393

might be issued not merely with an eye to the facts of the case and the law of the land but with the object of grinding a political axe. In the case of Marshall the saving grace was that he did not come to any decision by twisting the law and artificially fitting in the facts with its provisions. He saw to it that the conclusion followed automatically and spontaneously from the enunciation of the law and its application to the facts of the case in hand. But Taney issued a judgment, in the case under review, which did not so follow.

Dred Scott was a negro slave belonging to a white gentleman known as Dr. Emerson. He was taken in 1834 from Missouri into the State of Illinois and two years later to a place which was within the region from which slavery was excluded under the Missouri Compromise of 820. In 1838, however, Emerson returned to Missouri. accompanied by Dred Scott. A few years later the slave was sold to John Sandford of New York. But he did not remove Scott from Missouri. Now a suit was filed in a lower State court of Missouri It was contended that as Scott had been carried to a region from which slavery was excluded, he was now a free man. This court decided the case in favour of Scott but the State Supreme Court where it was carried on appeal refused to entertain this plea. As Scott had been brought back to Missouri, he was certainly a slave. The case was remanded to the lower court. But

before it tried it *de novo,* a case was instituted in the district federal court on behalf of Scott against Sandford for assault, etc. Now in this court such a case could be entertained only if Scott was a citizen (not a slave) of Missouri. Sandford was a citizen of New York and if Scott was a citizen of another State, then the federal district court could take up the case. The court, however, refused to regard Scott as a citizen of Missouri and rendered decision in favour of Sandford. The case was now carried on appeal to the United States Supreme Court over which Taney presided. If this Court merely said what the district court had said already, it would have been all right. But it was not thought enough by the Supreme Court that Dred Scott was a slave and not a citizen. Taney wanted by judicial decision to dispose of the question which had been agitating the public mind so much for years. The question was whether slavery could or could not be extended to territories. The *Compromise* which had been effected in this regard in 1820 had broken down. Now Taney went out of his way, in course of his judgment in this case, to take up this question in hand. He observed that not only Scott was a slave as he had returned to Missouri but he continued to be a slave when he had been carried to a territory from which slavery had been excluded by Missouri Compromise. The Congress had no

right in his opinion to say that a territory should be either slave or non-slave. This was a subject which was not included within the jurisdiction of the Congress.

After the Civil War when the Supreme Court was, for decades, republican in composition, it might be expected that it would revive the traditions of Marshall and issue its decisions by way of augmenting central jurisdiction. But one impediment and that an effective one was now placed in the way of such decisions. Many of the cases which the Court might decide so as to widen national jurisdiction and augment central power involved social questions at which the judges not unoften looked from the angle of capitalistic individualism. They did not want the government to interfere in these matters. They wanted them to be left for disposal to the private parties concerned. The cases were connected with one or another aspect of inter-state commerce and will be discussed in the next chapter. It is enough to mention it here that the judges who were mostly old men and had lost to a great extent the elasticity of their mind and who were bred in capitalistic and individualistic atmosphere and traditions could not on many occasions rise above their own personal convictions and take a broad view of things. It was because of the exhibition of such narrowness of outlook and shortness of vision on the part of the judges

that the Supreme Court has come in for much criticism and denunciation. People after an analysis of the situation have come to the conclusion in many places that they are living under a judicial oligarchy which must be broken otherwise it would be impossible for them to introduce healthy laws for guiding and controlling the industrial life of the country.[13]

But from the above paragraph it is not to be deduced that since the Civil War the Supreme Court has contributed little to the extension of central jurisdiction. It was the intention in that paragraph to show that in many cases where the Supreme Court had an opportunity of liberally interpreting the powers of the Congress and widening thereby its jurisdiction, it desisted from such interpretation because of its economic and social obsession. But still it is a fact that in many other cases it did admit such liberal interpretation and allowed in consequence the central authority to be widened and extended.

[13] In 1937 a bill was introduced in Congress (at the instance of President Roosevelt) for reorganising the Supreme Court. It came to nothing. But a pamphlet issued in this connection (Judical Reform : Legal Quibbles *vs.* National Needs, Public Information Committee, Washington, D.C.) gives an idea as to the opinion which a large section of the people holds towards the judiciary. Two addresses of President Roosevelt (one at the Democratic Victory Dinner, March 4, 1937 and the other a Radio Address on March 9, 1937). should also be consulted in this connection. Both were issued by Public Information Committee, Washington, D.C.

CHAPTER XII

THE COMMERCE CLAUSE AND THE GROWTH OF CENTRAL POWER.

No clause of the Constitution has admitted of more liberal interpretation and been more utilised for the augmentation of central jurisdiction than the *Commerce Clause.* It has been provided in clause 3 of Section 8 of Article I of the Constitution that the Congress shall have power " to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." The power which was conferred upon the Congress to regulate commerce " among the several States " must have originated in the utter disgust which the fathers felt for the unseemly commercial rivalry carried on between the States during the period of the Confederation. The Articles of Confederation left the power to regulate commerce entirely in the hands of the States. The Congress had been given no jurisdiction over the subject. The result was that each State pursued a policy which, it thought, suited its interests best, irrespective of the complications which it might introduce in its relations with the other States of the Confederation. Actually as a result of the too individualistic and selfish policy adopted by the

different States, bad blood was created to a great degree among them.

The fathers, in their anxiety to obviate such a contingency in the new Union, decided to withdraw all authority over foreign and inter-state commerce from the governments of the States and assign it to the government of the Union. So it seems that the framers of the federal constitution endowed the Central Government with jurisdiction over inter-state commerce more with the negative object of withdrawing from the "several States" the right of setting up tariff walls against one another than with the positive object of empowering the Central Government "to regulate" different kinds of commerce "among the several States."[1] In any event they had certainly no idea as to the broad interpretation which could be put upon the word, "commerce," and as to the different kinds of subjects which might be controlled by the Federal Government under cover of regulating commerce among the several States.

As a matter of fact federal jurisdiction over inter-state commerce was so interpreted as gradually to ensure central control over many subjects which do not appear to have been in the

[1] James Madison has at least left it on record that the power of the Congress over "commerce among the several States" "was intended as a negative against injustice among the States themselves....." This opinion was expressed by him in 1829.

contemplation of the fathers when they framed the *Commerce Clause.* Some of these subjects can hardly be called commerce by even a far-fetched interpretation of the word. As early as 1824 a broad construction was put upon the clause by Chief Justice Marshall and his colleagues on the bench of the Supreme Court. This was done in a case which has been well known as *Gibbons v. Ogden.*[2] The question at issue was whether an Act of the New York State under which certain persons[3] had been given the exclusive right to navigate New York waters in steam boats was constitutionally valid or not. If it was to be regarded as valid, it would be necessary to assume that a State had such complete jurisdiction over navigation in its waters that it could, if it so chose, obstruct inter-state routes of communication by conferring the exclusive right of navigation upon those who would ply their boats only within the boundaries of the State. Chief Justice Marshall believed in constant collaboration between the States in economic matters. Such collaboration alone would cement the fabric of union set up in 1789. Without it such union would only be a skeleton breaking down at any moment. By way of facilitating such economic collaboration, he would interpret the *Commerce Clause* broadly and liberally.

[2] 9 Wheaton 1.

[3] Livingston and Fulton.

He defined commerce as not only traffic (involving the buying and selling of commodities and their transportation from buyer to seller) but also as intercourse. Now as the Congress had been given the right to regulate inter-state commerce, it had also the right to regulate inter-state transportation of commodities. The Act in question of the New York State, however, was standing in the way of such regulation by the Congress and as such it was *ultra vires.*

The attitude taken by the Supreme Court in 1824 in the case, *Gibbons v. Ogden,* was not uniformly maintained by it in the interpretation of the *Commerce Clause.* Its attitude in fact varied from to time time according to the nature of the cases and the composition of the bench. Sometimes it was very liberal and helped much in the augmentation of central jurisdiction. But at other times the Court took a narrow view of the *Commerce Clause* and did not allow it to be so interpretated as to extend federal jurisdiction. But inspite of such lapses on the part of the Supreme Court the authority of the Central Government steadily grew under the operation of this clause.

Passage of people or the sending of intelligence from one State to another has been interpreted as "commerce among the several States" and has, therefore, been included in the jurisdiction of the Central Government. The Supreme Court decided in 1878 in a case known as *Pensacola v. Western*

Union Telegraph Company[4] that telegraph as a means of inter-state communication was subject to regulation by the Congress. The words used by the Court in course of its judgment in this case may be particularly borne in mind. The powers of the Central Government in regard to the regulation of inter-state commerce, observed the Court, must keep pace "with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-couch, from the sailing-vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successfully brought into use to meet the demands of increasing population and wealth." It was latent in this judgment that when in the future radio communication between one State and another would come into vogue it would also be subject to Congressional regulation. Actually the Court in its decision in the case, *Federal Radio Commission v. Nelson Brothers*[5], approved of the Central Governmet exercising jurisdiction in this field.

Under the Constitution the Congress has been empowered only "to regulate" commerce among the several States. But it has been interpreted that the power to regulate includes the power to

4 96 U. S. 1
5 298 U. S. 256.

govern and the power to govern involves the power to restrain, to prohibit, to protect, to encourage, to promote.[6] Now as the Congress, by way of regulating, may promote inter-state commerce, it has been interpreted that it may on that score build railways and bridges on its own account and through its own agency or it may charter corporations and authorise them to build railways and bridges. Again, it has been interpreted that as the Congress by way of "regulating" inter-state commerce has the power "to protect" it from obstruction, it must have wide discretion in dealing with an emergency which may threaten to stop inter-state transportation. During the European War of 1914-18 the Congress was constrained to pass a measure known as the Adamson Act to deal with one such emergency. It was entitled "An Act to establish an eight-hour day for employees of carriers engaged in inter-state and foreign commerce and for other purposes." Obviously these employees were threatening to stop the working of the carriers unless the conditions of their service were improved. The Congress thought it right to intervene and passed the measure as referred to above to ensure the working of the carriers. In 1916 the constitutionality of this Act was questioned before the Supreme Court

[6] Edward Corwin—The Constitution And What It Means Today, (1937), p. 27.

which, however, in *Wilson v. New* [7] sustained the Act as consistent with the constitutional power and jurisdiction of the Congress. So the central legislature lawfully exercised the right of regulating the conditions of service of the workers employed in inter-state transportation.

While in 1916 the Court declared in favour of the Congress and recognised its right to regulate the conditions of service of workers employed in inter-state transportation, in 1933 its attitude became different. In this year the Congress enacted a measure, commonly known as the N. I. R. A, [8] one of the provisions of which was connected with the regulation of the hours of work and wages in productive industries. This provision was incorporated in the measure by the Congress on the plea that without such regulation of the wages and hours of work, the existing emergency affecting commerce among the States could not be properly dealt with. The Act was, however, turned down by the Supreme Court in what is known as the Poultry case. [9] Similarly in 1936 the Guffey Coal Conservation Act which had been passed by the Congress in 1935 to regulate the conditions of work of the miners was set aside by the Court, although long and protracted disputes between the owners and workers

[7] 243 U. S. 332

[8] National Industrial Recovery Act.

[9] Schechter Bros. *v.* U. S. (295 U. S. 495).

regarding wages and hours of labour had dislocated inter-state commerce in soft coal. But while the Court put this narrow interpretation on the power of the Congress to regulate inter-state commerce in these two cases, in another it showed wider outlook and interpreted this power as liberally as could be desired by the protagonists of wide federal jurisdiction. In 1935 was passed by the Congress the Wagner Labour Relations Act which required employers to permit their employees to organise freely and to bargain with them collectively. The Court sustained this Act in what is known as *Jones-Laughlin case* (and attendant cases). The bench divided by five to four and the Chief Justice Hughes delivering the judgment on behalf of the Court pointed out that the question whether "the incidents of employer-employee relationship in productive industries affected inter-state commerce was one of fact and degree."

As in regard to the regulation of wages and hours of labour in industries, so also in regard to trusts and combinations, the interpretation of the *Commerce Clause* by the Supreme Court has varied from time to time. But as in regard to the first subject so in regard to the second, the power of the Congress has been considerably widened inspite of this variable attitude of the Court. After the close of the Civil War tendency towards the monopolisation of industrial production became

increasingly noticeable in the United States. The formation of trusts became so common as to constitute a positive menace to the interests of the consuming public. The question now was if the Congress had any power to prevent by legislation the formation of such trusts.

In 1890 it was thought that under the *Commerce Clause* the Congress had power to undertake legislation against this menace. The Congress could regulate traffic among the States. In other words it could regulate the purchase and sale of commodities among the several States. It could, therefore, control as well the principles of production of the commodities, which would be so purchased and sold. It was by such interpretation of the *Commerce Clause* that the Sherman (Anti-Trust) Act was passed in this year. It declared illegal all combinations and contracts in restraint of inter-state or foreign commerce. This Act was not turned down by the Supreme Court when cases in which this measure had been enforced came up for disposal at its hands. But all the same it is true that the attitude of the Court towards its operation has not been uniform. It has varied from time to time. In 1895 was decided the famous Sugar case.[10] The Central Government had undertaken the prosecution of the Sugar Trust under the Sherman Act. But the Supreme Court did not

[10] United States *v.* E. C. Knight Co. 156 U. S. 1.

uphold the prosecution on the ground that production by the Trust was a matter to be regulated by the State in which the production took place. It was not included in the field of inter-state commerce, and was not to be regulated in consequence by any measure passed by the Congress.

But ten years later the Court, now imbued with anti-trust zeal, virtually revised its opinion in regard to the scope of the application of the Sherman Act. In what is known as the Swift case,[11] it applied the Act and declared illegal a combination which was in every way analogous to the Sugar Trust of 1895. Some thirty firms purchased livestock in Chicago and other cities, converted it at their packing houses into fresh meat and sold and shipped this meat to purchasers in other States. These firms were charged under the Sherman Act with having formed a combination with the object of refraining from bidding against one another in the local markets, of fixing prices at which they would sell there, and of restricting shipments of meat. They appealed to the Supreme Court and argued that the acts for which they had been charged with the non-observance of the Sherman Act were not acts of inter-state commerce and, therefore, outside the jurisdiction of the Central Government. The Court rejected this argument and pointed out that although the

11 Swift and Company *v.* United States 196 U. S. 375.

acts might themselves be local in character and hence subject to State regulation, still they affected inter-state commerce and as such were within the jurisdiction of the Congress.

The scope of the *Commerce Clause* in this respect became thus truly comprehensive. In 1922 the Supreme Court, in course of its judgment in the well known case, *Stafford v. Wallace*, observed, "whatever amounts to a more or less constant practice, and threatens to obstruct or unduly to burden the freedom of inter-state commerce is within the regulatory power of the Congress under the *Commerce Clause*, and it is primarily for the Congress to consider and decide the fact of the danger to meet it." Chief Justice Taft issued this judgment on behalf of the Court and upheld thereby the Stockyards Act which the Congress had passed in the previous year, with the object of securing the free and unburdened flow of livestock from the farms of the West to the consuming cities of the country in the Middle West and East.

Navigation is undeniably a branch of transportation and as such of commerce. Now as the power to regulate inter-state commerce is vested in the Congress and as the power to regulate has been interpreted as including the power to protect, the Congress has assumed authority to protect navigable streams from obstruction and to improve their navigability by the erection of dams. Further as the erection of such a dam is intended

for the improvement of navigation and as such constitutionally valid, there is certainly nothing constitutionally wrong in utilising this dam for other purposes as well. So the Central Government, under cover of regulating inter-state commerce, has advanced step by step and it has not only undertaken the erection of dams to improve navigation but has undertaken the generation of electricity at such dams. This electric power again it happens to regard as its own property. Now the question is as to how this property will be disposed of. It may be purchased for utilisation in places far from the dam at which it is generated. In view of this fact it is necessary for the Central Government to purchase transmission lines from a private company. In what are known as the T.V.A.[12] cases, the Court has recognised this power on the part of the Congress to purchase transmission lines from a private compay. So it may be repeated that the power to regulate inter-state commerce has been interpreted as implying the right to generate electricity, to carry it to a distant market through transmission lines and to sell it there. This is certainly a startling evolution of central jurisdiction and authority.

It is not again merely in the inter-state field that the Congress can exercise its power under the *Commerce Clause*. It may sound paradoxical

12 Tennessee Valley Authority. This is a great experiment.

but it is true that the Congress, by way of regulating inter-state commerce, may exercise jurisdiction in purely intra-state matters. In those cases in which intra-state traffic is closely connected with the inter-state one, the regulatory powers of the Congress are not confined to the latter. They may be extended to the former as well. As without controlling intra-state traffic in these cases it becomes impossible to control inter-state traffic in the proper manner, the former must be as much subject to the jurisdiction of the Congress as the latter. Thus the rates of transportation can as much be laid down by the Congress in the inter-state as in the intra-state field.

The Congress again may undertake measures to protect the instruments and agents of inter-state transportation. So when inter-state and intra-state agents are combined in certain circumstances, it can undertake similar measures in regard to the agents and instruments of local transportation as well. Thus "when cars engaged in local transportation are hauled as part of a train along with cars, which are engaged in inter-state transportation, the former as well as the latter must be provided with safety appliances, which are required by the Federal Safety Appliance Act, otherwise they might impede or endanger the inter-state transportation."[13]

13 Corwin—The Constitution And What It Means To day, (1937), pp. 29-30.

The power "to regulate" has again been interpreted as including the power to prohibit commerce among the States. That the Congress may exercise the latter right unless specifically forbidden to do it by the Constitution appears to be suggested by the inclusion of Section 9 of Article I in this document, which forbade Congress to put a stop to the importation of slaves until 1808. That such a specific section had to be introduced in the Constitution in order to prohibit Congress from stopping the importation of slaves before 1808, may be regarded as implying that in other matters not so prohibited, the Congress might certainly undertake measures to put a stop to commerce. In regard to commerce with other countries such interpretation has been accepted without objection from any quarter. But in respect of commerce among the several States it has not been accepted so unanimously and so frankly. In some quarters it has been contended that the Congress cannot exercise this power to prohibit commerce among the several States, if by exercise of such power it happens to control those matters which have been in the past regulated by the States. In other quarters, however, the power of the Congress to prohibit certain aspects of inter-state commerce has either not been questioned at all or has been declared to be quite in order by the courts. The attitude of the courts, however, has not been uniform. As in

other aspects of the *Commerce Clause,* so in this aspect also the attitude of the courts has varied from time to time.

The shipment of high explosives from one State to another has been prohibited by the Congress except under very stringent regulations. Similarly, the Lindberg Law passed by the Congress in 1932 has prohibited kidnapping, when the victim is taken across the State lines, by making it a crime against the United States. It was also by way of exercising its power to prohibit inter-state commerce that the Congress enacted the Securities Act of 1933 under which the Security and Exchange Commission was set up. This body may lay down regulations by which dealing in securities can be kept within honest limits. In a case known as *Brooks v. U.S.*,[14] the Court in fact went to the length to observe : "Congress can certainly regulate inter-state commerce to the extent of forbidding and punishing the use of such commerce as agency to promote immorality, dishonesty, or the spread of any evil or harm to the people of other States from the State of origin. In doing this it is merely exercising the police power for the benefit of the public, within the field of inter-state commerce."

From the above it might appear that the court was approving of the Congress prohibiting

[14] 267 U.S. 532.

inter-state commerce in every matter involving immorality and dishonesty. But in 1918 the Supreme Court took up a different attitude in the famous case known as *Hammer v. Dagenhart.*[15] In 1916 the Congress had passed an Act prohibiting transportation in inter-state commerce of goods made at a factory in which children under fourteen were employed or children from fourteen to sixteen were employed more than eight hours a day. The Court observed that by such an Act the Congress was not really regulating inter-state commerce but was invading the reserved powers of the States.

So it may be asserted that the Central Government has assumed an increasing jurisdiction under cover of regulating inter-state commerce. It should, however, be emphasised that it could have assumed greater authority still if the courts had not been so inconsistent in their opinions.

15 247 U. S. 251.

CHAPTER XIII

National Labour Relations Board and Central Power

The widening jurisdiction assumed by the Federal Government under the *Commerce Clause*. has already been emphasised in some detail. In the present chapter it is intended to deal with the development of central power in a particular sphere under this *Clause*. The employers in the United States systematically denied the right of their employees to organise into unions of their own choosing. Further, they also refused with equal persistence to accept the procedure of collective bargaining. Strikes and other forms of industrial strife and unrest were repeatedly brought about in consequence in the country. Such strikes and unrest were certainly obstructing inter-state commerce by impairing the efficiency, safety or operation of the instrumentalities of commerce, and by materially affecting and restraining the flow of both raw materials and manufactured goods into the channels of commerce. The Federal Government became convinced that the inequality of the bargaining power between employees who did not enjoy full freedom of association and employers who were thoroughly organised "substantially burdens and affects the flow of commerce

and tends to aggravate recurrent business depressions.''[1]

Accordingly the Congress passed the National Labour Relations (Wagner) Act in 1935, which under Section 7 guaranteed to the workers "the right to self-organization, to form, join, or assist labour organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.'' The Act[2] also made it "an unfair labor practice" for an employer to interfere in any way with the full enjoyment and exercise of the right which it conferred upon the employees in respect of their organisation and collective bargaining through their own representatives.

In order that the National Labour Relations Act might be properly enforced, it provided for[3] the creation of the National Labour Relations Board which was actually set up in August 1935. The Board consists of three members appointed by the President "by and with the advice and consent" of the Senate. One of the members of the Board is designated by the President to serve as chairman of this body. The members are to hold their

[1] Section 1 of the National Labour Relations Act. This Section deals with "Findings and Policy."

[2] Section 8.

[3] Section 3 (*a*).

office for a period of five years,[4] but may be removed by the President for neglect of duty or malfeasance in office. It is the responsibility of the Board to deal with a complaint which a worker or his organisation may prefer against an employer regarding his interfering in the exercise of the right which the Act has conferred upon the employees. It is for the Board again to investigate when any controversy will arise regarding the *bona fide* character of the representatives of the employees, designated or selected for purposes like bargaining with the employer. The Board in fulfilling its duties in such cases may be required to hold elections by secret ballot under its supervision and ascertain the names of the representatives actually chosen.

The machinery through which the Board happens to work is a most elaborate one. Its duties are distributed among its several divisions, the most important of which are the Administrative, the Legal and the Trial Examiners' Divisions.[5] The Legal Division which is under the supervision of the General Counsel is in charge of the legal work involved in the administration of the National Labour Relations Act. This work

4 The first members were, however, appointed on another basis, one being appointed for one year, one for three years, and the third for five years.

5 Besides the three Divisions referred to above, there are the Economic Division and the Publications Division.

is distributed between two main sections—the Litigation and the Review Section. "The Litigation Section, headed by the Associate General Counsel is responsible for the conduct of hearings before the Board and advises the regional attorneys in their conduct of hearings before the agents of the Board in the field."[6] This Section also represents the Board in all cases instituted in the courts in regard to any work of the Board. The Review Section, which is under the supervision of the Assistant General Counsel, is concerned with analysing the records of hearings which may take place before the Board itself or in the Regions. Besides, it advises the Board in all general questions of law and in questions involving the interpretation of the National Labour Relations Act. The Trial Examiners' Division is entirely separate from the Legal Division and operates under the direct supervision of the Chief Trial Examiner.

The Board cannot certainly discharge its responsibilities and obligations only through its Divisions located at Washington. It is essential that it should have a net-work of organisation throughout the country, so that the disputes arising in all parts of the Union between the employers and the workers in regard to the organisation of labour might be dealt with properly and

6 See the Third Annual Report of the National Labour Relations Board, p. 9.

expeditiously. To this end, the country has been divided into twenty-two Regions. These Regions not only include inevitably in some cases more than one State, but what is more they cut across State lines as well. We find, for instance, that in Region No. 1 are included the States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, and several counties of Connecticut. In Region No. 2 are included a few counties of Connecticut, several counties of New York and several counties of New Jersey. In Region No. 3 is included only the rest of the New York State. These facts would show that the Regions carved out by the National Labour Relations Board definitely cut across State boundaries and have been created irrespective of State-limits.

At the head of each Region is placed a Director, who is the administrative head of the Regional Office and works under the supervision of the Secretary, who is the head of the Administrative Division of the National Labour Relations Board at Washington. Associated with the Regional Director is the Regional Attorney, who is the legal officer in the Regional Office and acts as counsel to its Director. The Regional Office does not complete the organisation of the National Labour Relations Board in the country. There is a large number of Field Examiners scattered over the Union who aid the Regional Directors in the discharge of their many responsibilities like

investigations, and securing compliance with advice offered and decisions issued in regard to disputes. These Examiners have also to act as agents of the Board itself in holding elections whenever there is a controversy as to the position of the representatives chosen for purposes of bargaining.

Any individual or labour organisation, sufficiently interested in the matter, may lodge a complaint in the Regional Office against an employer for an alleged "unfair labour practice." The Director of the Regional Office consults the Regional Attorney as to the legitimacy of any complaint which may have been so made. If it is found trivial, he tries to persuade the complainant to withdraw the charge which has been brought against the employer. In innumerable cases the charges preferred have not stood scrutiny and the complainants have been persuaded to withdraw them. From October 1935 to August 1937, that is, in a period of less than two years, as many as 1,663 such charges were withdrawn by the petitioners on the advice of the Regional Office. There have been cases, however, in which the Directors are advised by the Attorney that the charge is flimsy but in which the petitioners may not be persuaded to withdraw the charges. In such cases the Director uses his discretion and refuses to entertain the complaint.

But when the Attorney advises the Director that a *prima facie* case has been made out by the

complainant against the employer, he issues a complaint against the latter and serves a notice upon him. A Trial Examiner is then sent from Washington to preside over the hearing. The parties of the case are on the one side the Director of the Regional Office and on the other side the employer against whom the complaint has been issued. The Trial Examiner acts as the judge and the Regional Attorney as the counsel of the complainant. After hearing the version of the two sides and the evidences adduced by them, it is the usual practice for the Trial Examiner to submit to the Director "an Intermediate Report" in which are embodied all the facts of the case as submitted during the hearing and the recommendation of the Trial Examiner. The report is submitted to the Director for transmission to the Board at Washington and to the parties concerned (the employer and the complaining worker or union).

If the recommendations of the Trial Examiner is accepted by both the parties, the case does not proceed further. It is finally disposed of here. But if either of the parties feels aggrieved, it may, within ten days (the time may be extended), file "exceptions" to the findings of the Trial Examiner with the Board itself at Washington. The Board then may call for fresh evidences and arguments and then decide the case on the basis of these new materials or may issue its verdict on the basis of

the facts which the Trial Examiner has already transmitted to it. Once this decision has been announced, it is open to the parties concerned to accept it and act up to it. But otherwise the Board has no authority to make its decision binding upon them. It has no power to enforce its verdict. In order, however, that its efforts to mete out justice may not be in vain and in order that the decision at which it has arrived at may not be a mere recommendation to be rejected by the aggrieved party, it has been provided that "the Board shall have power to petition any Circuit Court of Appeals of the United States." The judgment of this Court is final and binding upon the parties.[7] The number of cases instituted before the Board or before its agencies is astoundingly enormous. During the one year from July 1, 1937 to June 30,1938, "a total of 8,213 complaint cases, involving 1,643,039 workers, was on the dockets of the Board."[8]

In the above paragraphs we have discussed at length the procedure followed "to prevent any person from engaging in any unfair labour practice," under Section 10 of the National Labour Relations Act. We should now proceed to deal in brief with the procedure which is followed in giving effect to the provisions of Section 9 of the Act. This

[7] Section 10(*e*) of the Act.

[8] Third Annual Report of the Board, p. 27.

Section provides that the representatives chosen by the majority of employees of any particular unit for the purpose of collective bargaining with the employers "shall be the exclusive representatives of all the employees in such unit" for the purpose. It is for the Board to decide the basis of the unit. It is also for the Board to decide whether the election of the representatives has been in the proper manner or not. In case such election has not been proper, in its opinion, it is empowered to hold under its own supervision a fresh election by secret ballot.

Now the procedure which is followed in this connection is virtually as elaborate as in the case of preventing unfair labour practice. A petition to investigate and certify the names of the representatives may be filed by any employee or labour organisation. Except in some cases when such a petition may be filed with the Board itself, it must be filed with the Regional Director and contain some necessary facts. The copies of the petition are forwarded to the Board which decides if an investigation is necessary or not. If it thinks it necessary, it authorizes the Director (of the Region) to undertake it. He serves notices upon the parties and then a Trial Examiner is sent down from Washington to preside over the hearing. Both the parties bring witnesses and adduce evidences. As the hearing closes, the Regional Director forwards to the Board all the proceedings.

The Board, either exclusively on the basis of these proceedings or after listening to further arguments, proceeds to issue its verdict. It may decide that the representatives elected have been properly returned, or it may declare the election as void and order a fresh election by secret ballot under its own supervision. In case the latter decision is taken, the Board designates an agent who after holding the election is to submit an Intermediate Report to the Board. In this Report he is to detail the facts as to the election and insert his own recommendation. If the recommendation is accepted by both parties, well and good. If not, either party may file within five days an objection with the Regional Office. The Regional Director, if satisfied that the objection is flimsy, will forward to the Board the Intermediate Report of the agent and it will be for the Board either to declare the election as recommended by the agent or order fresh election.

In case the Director is satisfied that the objection is reasonable, he shall cause the parties to appear before a Trial Examiner and adduce grounds as to the validity or otherwise of the objection raised. When the hearing is over, the Director will forward to the Board the Intermediate Report of the agent together with the objections filed and the proceedings before the Trial Examiner. It is for the Board now either to order a fresh election or to announce the names of the elected

representatives according to the recommendations of the agent. The number of "representation cases" before the Board is certainly smaller than the number of "complaint cases." But even then it should be borne in mind that it is not small. During the year 1937-38, the total number of "representation cases" on the docket of the Board was 4,419 involving 1,488,649 workers.

From the details given in the above paragraphs regarding the work of the National Labour Relations Board, it will be clear how far-reaching powers are now being exercised by the Central Government in a field which was never intended by the fathers to be included in federal jurisdiction. Such jurisdiction has, however, been found by the liberal interpretation of the *Commerce Clause.* There is certainly no gainsaying the fact that this *Clause* has become a very potent instrument of central authority and power.[9]

[9] The facts which have been used in this chapter have been taken from the publications of the National Labour Relations Board including the National Labour Relations Act and the Rules and Regulations framed by the Board under Section 6. Four Lectures on the working of the National Labour Relations Board (two by its Chairman, Mr. Warren Madden and two by one of the members, Mr. Edwin S. Smith) have been very helpful in appreciating the importance of the work that the Board is performing and in estimating the reaction of the public to such work.

CHAPTER XIV

Federal Grant-In-Aid And Centralisation

Federal grant-in-aid has become another important factor in the development of central authority and power in the United States of America. Grants have been made systematically for over three quarters of a century by the Federal Government to the States. But since 1911 they have become positively an important instrument in the augmentation of central authority at the expense of State power. The system of grant-in-aid evolved since then has made it possible for the Government at Washington to influence and even to direct the discharge of responsibilities, which are ordinarily the concern of State Governments.

The State Governments are short of funds and find it difficult to discharge properly and efficiently many of their vital responsibilities. They seek and welcome in consequence financial assistance from the Central Government. The latter, however, in making the grant-in-aid, lays down conditions which have to be acted up to by the State authorities. The Central Government has also set up an inspectorate to see that the conditions, which it has laid down, have been properly and adequately fulfilled by the State Governments. The States which cannot afford to forego the grant have to

submit to the inspection and control of their work by these agents of the Federal Government. No wonder, therefore, that as a result of the inauguration of the grant-in-aid system, national supervision over State activities has become not only possible but even normal in many fields to-day.

The history of federal grant to the States is interesting. When it was first begun, none could imagine that it could at any time be the basis of such supervision which the Central Government now exercises over the States. It was only when the Morrill Act was on the legislative anvil on the eve of the Civil War that the danger of the federal grant to the sovereignty of the States was first perceived. Grant of land had been made to the States since the beginning of the American federation. In fact it was four years before the federation was started on its career that the practice had begun. In 1785 the Congress of the Confederation granted land subsidy to the component States for the maintenance of schools. The practice thus inaugurated by the Confederation was taken over by the new Union. In 1802 the precedent created by the Confederation was followed by the Federal Government which granted land to the State of Ohio for educational purposes. Since then almost every State admitted into the federation was given sufficient land for its schools. Besides this grant of land, money grants also were made to the States on occasions, even in the first half of the

last century. In 1837 for instance twenty million dollars—a surplus in the United States Treasury—were distributed among the States in proportion to their Congressional representation.

But although grants of land and money had been made to the States in the first half of the 19th century, it was the Morrill Act passed by the Congress in 1862, which might be regarded as the foundation of the grant-in-aid system of to-day. This measure was passed by the Congress in order that the agricultural and mechanical colleges in the States might be financially assisted by the Federal Government by grant of land. This grant, which was provided for by this Act, was virtually to be an unconditional one. It might, therefore, be taken as rather an innocent measure. But it is significant that even a bill like this was opposed tooth and nail in the legislature by the members from the South and could not become an Act until they withdrew from the Congress with the secession of their States from the Union. The history of the measure is in fact interesting. It was introduced in the House of Representatives in 1857 by Justin Morrill and provided for the distribution of public land among the different States in proportion to their population. This land was to be sold and the money thus obtained was to be invested. The income accruing from this investment was to be spent for endowing, supporting and maintaining at least one college for imparting instruction in

agricultural and mechanical arts among other subjects.

The Southern members, as it has been pointed out already, regarded the bill with suspicion as they thought that its provisions would augment central authority at the expense of State sovereignty. When the bill reached the Senate, one member of this house actually remarked that the bill took the States to be "creatures instead of creators" and that it "proposes to give them their own property and direct them how to use it." The bill was no doubt passed by both the houses inspite of this opposition. But President Buchanon vetoed it in response to Southern demand. For the time being, therefore, it remained excluded from the statute book but the bill was introduced again in the Congress in 1861 and became Act in the following year. The Act, as we have seen, provided virtually for unconditional grant of land to the States, the only conditions laid down in this connection being (*i*) that it was to be utilised for the specific purpose of imparting instruction in mechanical and agricultural arts among other educational subjects, (*ii*) that the Governors of the States enjoying the grant were required to submit to the Congress an annual report regarding the amount of land sold and the amount of money received therefrom, and (*iii*) that a similar report was to be submitted in regard to the administration of the colleges for which the

money accruing from the grant was spent. So apart from the obligation to supply annual information to the Congress, the authorities of the States were not subjected to any control on the part of the Central Government which made the grant.

Twenty-five years later another Act was passed by the Congress in 1887 (Hatch Act), which provided that fifteen thousand dollars would be appropriated for each State in order that an experiment station might be set up and maintained in each agricultural college established under the Morrill Act of 1862. It is true that the States were not required even by this Act to fulfil any conditions worth the name in order to make themselves eligible for the grant. But it is significant that under the provisions of this statute a federal inspectorate was created in order that the State experiment stations, which were to receive federal funds, might be properly supervised by this agency of the Federal Government. The establishment of this inspectorate in 1887 was until 1911 the only singular instance of federal supervision of the State institutions and activities, which received federal grant.

Three years after the passing of the Hatch Act, the measure known as the second Morrill Act was placed on the statute book (1890). It tightened further the grip of the Central Government over those State subjects whose administration was to be aided by central grant. The Act

provided for a large appropriation for each State so that colleges for the benefit of agriculture and mechanical arts might be better endowed and maintained. The condition to be fulfilled in this connection was that if any portion of the subsidy was misused, the State Government must replace it. The Secretary of the Interior was to secure information regarding the management of the colleges. If he found it unsatisfactory, he might withhold the grant, subject to an appeal to the Congress by the State Government concerned. So the system of grant-in-aid begun in 1862 became increasingly conditional in character and involved an increasing supervision and control on the part of the Central Government. It was, however, not till 1911 that the system of grant-in-aid acquired all the implications which we associate with the system to-day.

In 1911 a definite departure was really made by the Federal Government from the policy which it had pursued in regard to the grant-in-aid to the States since 1862. An Act known as the Weeks Act was passed by the Congress in this year. Its object was to stimulate State efforts on a proper scale for the preservation of forests. The Act provided for an appropriation of two hundred thousand dollars which would be available to the Secretary of Agriculture so that he might "co-operate with any State or group of States, when requested to do so, in protection from fire

of the forested watersheds of navigable streams." The Federal Government, however, would co-operate and make the grant-in-aid to the States for the particular purpose only on some definite conditions being fulfilled by the State Governments. Of the conditions laid down, the first and foremost was that the States would make an appropriation, for this purpose, of a sum which be must equal to that received from the Federal Government. This matching of the federal grant by State appropriation continued to be the basic principle of federal grant-in-aid for over two decades. The second condition to be observed by the Governments of the States was that the programme of work for which grant would be sought must conform to the regulations made by the Federal Government and must have the approval of the federal officials. The third condition laid down by the Act was that the State Governments must allow the works supported by federal funds to be inspected by federal officials.

It should be emphasised here that the conditions provided for by the Weeks Act and detailed in the previous paragraph were not only the sheet-anchor of the grant-in-aid system maintained by the Federal Government in the U.S.A. until 1933 but with slight deviations they continue to be the basis of federal grants to the States even to-day. We shall presently see that owing to abnormal economic situation in the country deviations had

to be made during the Roosevelt Administration from the grant-in-aid system enunciated above. But until this economic crisis overtook the country all the Acts, which the Congress happened to pass since 1911 by way of making grant-in-aid to the States, were so framed as to contain similar provisions for the matching of the grant by State appropriation and for necessary federal control and inspection.

The subjects for the proper administration of which federal grant-in-aid was offered and received from 1911 to 1929 included forest preservation,[1] agricultural extension and research,[2] militia,[3] high ways,[4] vocational education,[5] venereal diseases,[6] and maternity hygiene.[7] The grant which was made in 1911 and the years immediately following was a small one. In 1915 it was only about eleven million dollars. But gradually the grant began to grow. The federal aid for highway construction introduced in 1916 was responsible for "the first important swelling of the stream."[8]

1 Weeks Act (1911) and Clarke-McNary Act (1924).

2 Smith-Lever Act (1914) and Purnell Act (1925).

3 1916. 4 1916 and 1921.

5 Smith-Hughes Act (1917) and George-Reed Act of 1929.

6 1918. 7 Sheppard-Towner Act (1921)

8 In 1930 fifty-four per cent. of the "presumably permanent grants in-aid" was given for high way construction. But in 1939, although grants for this purppose were more than doubled in amount they represented only twenty-seven per cent. of the total "regular" grants to the States. See A. F. Macdonald—Federal Aid to the States in the American Political Science Review (June, 1940).

The amount of grant which was only eleven million dollars in 1911 swelled nearly to one hundred and fifty million in 1930. Similarly the number of inspectors when first appointed in 1887 was only five but by 1930 this number had gradually increased to one hundred and fifty.[9] These figures tell their own tale. They bring out into relief the growth of financial aid which the Federal Government provided to the States and they emphasise also the corresponding increase in the extent of control which the former had now an opportunity of exercising over the latter.

It is true that one hundred and fifty million dollars which the Federal Governmeut granted to the States in aid of certain subjects was not, absolutely speaking, a very small sum. But still it should be remembered that this represented only a small percentage of the income of the States. In 1902 the federal grant amounted only to 1·4 per cent. of the State revenues and in 1932 it rose to be 10·8 percent.[10] Although it was not easy for the States to forego the income which they derived from federal grant-in-aid, still until 1933 such grant-in-aid was not a vital source of their revenues. With effect from this year, however, the situation began to change very rapidly. The country, which had been in the grip of an economic

[9] Leonard White—Trends in Public Administration, (N. Y., 1933), pp. 33, 37.

[10] Henry J. Bitterman—State and Federal Grant-in-Aid, (1938) p. 54.

crisis for some years, could be raised out of the rut only by comprehensive activities on the part of the Federal Government and by sincere co-operation between all the governmental authorities in the country. Accordingly Roosevelt Administration undertook the responsibility of financing the States on a scale, which was formerly unknown and even unthinkable. In order to meet the problem of rapidly spreading unemployment and in order to give relief to the people, who were otherwise distressed, it was thought necessary by the Federal Government to institute the federal relief programme. The grant-in-aid, which was made by the Federal Government in this connection, was consequently a large and huge one. The one important peculiarity of this grant-in-aid was that the States were not required to match it by appropriation on their own part. It was not even compulsory that the Governments of the States which were to receive the grant should make any contribution at all to the administration of the programme.[11] Money might come exclusively from the federal source. So it was not surprising that the federal grant-in-aid which had amounted only to 150 million dollars in 1930 rose to a billion dollars in 1933 and then jumped to the high point of 2,160,000,000 dollars in 1935.

11 Some of the States actually contributed nothing.

In 1936 this money grant to the States was reduced by half.[12] But though the money grant was reduced, the federal expenditure for relief purposes was not curtailed. It was only the method of assisting the States, which was altered. Up to 1935 they were aided by money from the federal treasury so that they might tackle the question of affording relief to the distressed people. In the following year, however, was begun the policy of giving aid in service instead of in money. This policy has been characterised as that "of quasi-grant-in-aid."[13] Instead of finding money for the States by which the latter could create work for the unemployed, the Federal Government undertook to employ them on its own account in works managed either directly by an agency of its own or indirectly by firms which entered into contract with it. The Works Progress Administration (W.P.A.) undertook to employ people directly at some fixed rates of remuneration in the work of repairing Government buildings, monuments, etc. The Public Works Administration, however, worked through contractors who employed people in their works. Now in whichever way the programme was carried out, the fact remained that people for whom it was the duty of the States to find employment were actually employed at federal

12 The amount of grant in 1936 was 1,004,000,000 dollars.
13 Bitterman—State and Fedesal Grant-in-Aid., p. 54.

expense. Up to February, 1939, the Federal Government had to spend altogether 10,556,905,000 dollars for purposes of affording relief to the distressed in one form or another.

We have already pointed out that since 1933 there have been some deviations from the principles of the grant-in-aid system which were observed for over two decades before that year. It is true that these deviations are noticeable mostly in the extraordinary grants-in-aid which the Federal Government has been required to make because of the economic crisis and do not apply to the grant-in-aid in other spheres. These deviations should, however, still be emphasised here. In the first place we have seen in the previous paragraph that for affording relief the federal grant was made in some cases not in money but in service. This is a development which should be reckoned with. Secondly, the principle of matching the federal grant by an equal appropriation on the part of the States was not only abandoned in the federal grant-in-aid for relief purposes, but what is more significant still is that it was modified in regard to the federal grant for some of the objects with which the Social Security Act of 1935 was passed. We shall have opportunity of discussing the schemes of social security in another place. It is not, therefore, necessary to discuss them here. We may only emphasise now that in regard to some measures adopted in this field matching requirements have

been relaxed to a great extent. We may regard this development as more significant because grant for relief is expected to be only temporary, but that for social security will be a permanent feature of Federal-State relations. [14]

In the early stages, as we have seen, federal grant to the States took the form of the allocation of public lands to them. Section 3, Article IV of the Constitution, lays down that "the Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." It was by the exercise of this constitutional power that the Congress made land grants to the States. But the power of the Congress to make grants to the States was not limited by this particular provision of the Constitution. Under Section 8 of Article I its power of making appropriation is not confined to some specific objects. This power is provided for in such general terms that it seems plausible that this power can be applied to any

[14] The Housing Act passed in 1937 also provides for co-operation between the Federal Government on the one side and State or local authorities on the other in providing "low rent" houses to families with small income. The Act while providing for annual contributions of the Federal Government in this regard insists only on "at least 20 per centum of the annual contributions" by either the State "or one of its subdivisions." So the federal grant-in-aid has been liberated from the shackles of the matching requirement. It may now be said, in the words of Professor Macmahon, that "clearly federal aid no longer conforms to a stereotype." (See his Article on "Public Spending—With Strings" in Survey Graphic (Nov., 1938).

subject. The jurists in fact have interpreted this clause in this light.

As early as 1833 Justice Story wrote in support of this standpoint in his *Commentaries.* Appropriations, he observed, had never been limited by the Congress to cases falling within specific powers enumerated in the Constitution, whether those powers were construed in their broad or narrow sense.[15] So it was open to the Congress to make money grants to the States for any object provided only the States would like to have them. It is true that so long as the original provision of the Constitution that no direct tax could be levied, unless it was to be apportioned among the several States, according to their respective numbers was not repealed, the Federal Government could not impose an income tax upon the people. But this impediment was removed by the adoption of XVI Amendment to the Constitution, which released the Federal Government from the obligation of making a direct tax proportionate to the census. So income tax was levied and the financial resources of the Federal Government increased steadily. For years its receipts from the income tax, inheritance tax and customs tariff have been enormous. It, therefore, found it possible to increase the grant-in-aid to the States. Of course the abnormal expenditure involved in meeting the

15 Book III, Chap. XIV, Sec. 907. 908.

demands for relief during the last economic crisis was possible by loans only. But whatever may be the case during the last six years, there is no gain-saying the fact that the huge surpluses in the federal treasury alone made possible the swelling of the grant-in-aid to the States in years before the Roosevelt Administration.

It should be mentioned that the tax-payers have on many occasions felt aggrieved that the Federal Government have fleeced them for purposes which were not really within federal jurisdiction. They think that this Government unduly strains its power to make appropriations in order to subserve interests over which it is not expected to exercise any jurisdiction. Actually in 1923 the Supreme Court of the United States had to attend to the objections of the tax-payers against the Maternity Aid Act of 1921 under which the Federal Government was making conditional grants to the States for improving the maternity arrangements therein. The Court of course refused to entertain the objections as valid.[16] It held that the interest of an individual tax-payer of the nation was too remote to permit him to challenge an expenditure on the part of the Federal Government. The case was accordingly dismissed for "want of jurisdiction." So it seemed that the spending power of the Federal Government was beyond the possibility of

16 Frothingham *v.* Mellon (decided with Massachusetts *v.* Mellon, 262 U. S. 447, 1923).

legal attack. One gentleman in fact observed very regretfully that "this power of appropriation is... the vulnerable heel of our Achilles-like Constitution." [17]

The attitude of the Supreme Court in regard to the spending power as revealed in the previous paragraph has not, however, been uniformly maintained since. It has become less consistent and straightforward in recent years. In two ways the Court has sought to curtail the jurisdiction of the Federal Government in respect of its power to make appropriations. In 1936 (in *United States v. Butler*) the majority of the Supreme Court accepted, no doubt, Justice Story's view of the spending power of the Federal Government. But at the same time it emphasised the fact that the United States could make such appropriations, only for *general welfare*.[18] So those appropriations, which were not for the *general welfare* would be declared as illegal and unconstitutional. Now the Congress might regard a particular appropriation to be in the interest of the *general welfare* of the United States. The Supreme Court, however, might have its own view about it. Necessarily when

[17] Quoted by A. W. Macmahon—*Op. Cit.*

[18] Article I of the Constitution lays down that " the Congress shall have power to lay and collect taxes, duties, imposts and excises to pay the debts and provide for the common defence and general welfare of the United States..."

the Court has the final say in the matter, its viewpoint must prevail.

Secondly, the Court in this judgment[19] further decided that when an appropriation involved the regulation of a subject, which was included in the residuary jurisdiction of the States, it must be regarded as illegal and out of order. It was on this ground that the Agricultural Adjustment Act of 1933 was declared void by the Supreme Court. In its decisions in some subsequent cases, however, the Court did not take such a narrow view of the spending power of the United States Government. It rather, by its decisions in these cases, bolstered up the waning "prestige of the spending power" of the Federal Government.[20]

We may, therefore, conclude that until the first Agricultural Adjustment Act (A. A. A.) was declared unconstitutional, the Federal Government seemed to have unlimited authority, under its spending power, to make conditional grant-in-aid to the States. But since then the exercise of such authority has become subject to the approval of the Supreme Court. This body will be

19 United States *v*. Butler. 297 U. S. 1.

20 See Macmahon—*Op. Cit*. The cases were (*i*) Steward Machine Company, v. Davis, (*ii*) Carmichael *v*. Southern Coal and Coke Company, (*iii*) Helvering v. Davis. All of them were decided in 1937. The first two were in regard to unemployment insurance and the last in regard to old age benefits. The decisions upheld the Social Security Act.

differently constituted at different times and its attitude will also vary accordingly. The policy of the Federal Government will, in consequence, cease to be uniform. This Government must trim its sail according to the wind that may blow on the federal bench.

There is no gain-saying the fact that as a result of the development of the grant-in-aid system the balance of power between the federation and the States has been appreciably weighted in favour of the Federal Government. In regard to many subjects which are within the constitutional ambit of the States, observes a recent writer, the Federal Bureaus have now come to exercise an important influence over the determination of policies and the methods of their execution.[21] In fact, as Professor Leonard White points out,[22] the extent of federal influence "now rests less upon the constitutional allocation of power than upon the temporary agreement of the parties to the federal arrangements." These observations should not, of course, be taken to mean that the federal grant-in-aid has completely undermined the basic character of the constitutional system of the United States as created by the fathers in 178-887. It has widened federal jurisdiction and increased federal influence but the principle that the Union should

21 Bitterman—State and Federal Graut-in-Aid., p. 22.

22 Trends in Public Adminstration (N. Y., 1933), p. 16.

work on the basis of the autonomy of the States has not been vitally affected.

The grant-in-aid system has proved to be useful and beneficial in certain important respects. Except the extreme state-rights men whose number is very small now in the United States, every body notices and appreciates the virtues of the system which occupies such an important place now in the administrative organisation of the Union. The grant-in-aid has, in the first place, equalised to an appreciable extent the tax burden of the people of the different States. All parts of the Union are not equally prosperous. Wealth is now concentrating in some particular places while the other areas remain comparatively backward and unprogressive. Necessarily the taxable capacity of the people is not every where the same. If, therefore, the different States were expected to meet their obligations only from their own resources, either certain essential services like public health, education, agricultural research, and highways would be neglected in many areas or the tax burden upon the people of these States would be unduly heavy. It is essential that in regard to these subjects a high national standard should be maintained. But if it was to be maintained from the resources of the States alone, that would have put an undue strain upon the people of many of them. In fact, without aid from the Federal Government

the maintenance of these services on an efficient basis would have been out of the question. The virtue of the grant-in-aid system in this respect should certainly be recognised. Under this arrangement, the Federal Government not only gives to the States ample financial assistance in the discharge of these obligations, but lays down conditions to which all the States have to conform. By the enforcement of these conditions, a common national standard is roughly maintained in the performance of these services.

Secondly, it should be remembered that some functions which admitted of State management in the 18th century when the American Constitution was framed, can no longer be dealt with efficiently except on a national basis. Public health, for instance, would have been looked after, decades ago, on a local basis. But in the changed circumstances of to-day when infection can be carried so easily and so promptly from State to State, it is essential that a problem like that of venereal diseases must be tackled on the national basis by the National Government. If the power to this end was to be conferred upon the Federal Government in a straightforward manner, constitutional amendment would have been necessary. It is doubtful, however, if such an amendment would have been entertained by the people in all cases. Possibly in no case it would have been entertained in time. The grant-in-aid system,

however, has made possible proper co-operation between the States and the Federal Government, so that without depriving the States of their jurisdiction federal regulation has been introduced.

It should again be borne in mind that there are many people who have no faith either in absolute localism or in absolute centralism. It was by people of such outlook and temperament that the federal system was created and popularised. They were satisfied in 1787-88 with the clear distribution of powers and functions between the Central and State Governments. They had then a definite idea as to which subjects were of local importance and which of national concern. Now, however, because of the change in the circumstances and environments such differentiation has become difficult in many instances. No subject can definitely be said to be of local importance alone. In view of this change the old line of demarcation between the Union and its component units has become out of date. The Governments of the States as autonomous institutions have lost much of their utility. But if they are liquidated on this account, the Central Government will become all-powerful. Everything will come within its orbit. Its jurisdiction will be all-pervading. Adminstration on such a basis in a big and far-flung country like the United States of America, however, is not likely to be as efficient and as adapted to conditions in different areas as it

may be wanted to be. So in the opinion of these people the best arrangement of government in such a country is the one which provides for co-operation between a strong Central Government and the existing State Governments. Neither local initiative nor central regulation and supervision should be discouraged and left out of account. Both are essential for good government. Now they can be harmoniously combined by the grant-in-aid system as it has been worked for the last one quarter of a century and more. So this system should not only be allowed to stay but should be regarded as the final solution of the problem of government of the United States.

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CHAPTER XV

Social Security and Federal-State Co-operation

We have seen in the previous chapter that as a result of the development of the system of federal grant-in-aid the federalism of the United States has undergone a basic change. It can no longer be said with truth that the Central and State Governments happen to work only in their own spheres and move in their own orbits. The State Governments are no longer absolutely independent of central control and influence. In fact, a relation of active co-operation happens now to subsist between the two governments. The new federalism in the United States has, on this account, been called by some co-operative federalism.

Nothing illustrates this active co-operation between the Federal and State Governments more than the working of the Social Security Act which was passed by the Congress in 1935. This was the first comprehensive legislative measure undertaken by the Federal Government for ameliorating such social ills as unemployment, old-age dependency and helplessness of the blind and dependent children. The United States had been a land of plenty for long. The supply of land seemed to have been unlimited and any body who would not shirk

labour and would show some initiative and enterprise would have no difficulty as to decent living. The problem of unemployment did not in consequence appear until recently in the country. The chief incentive to social legislation was thus absent in the United States. Secondly, it should be remembered that as the people of this country had advanced so much by the exercise of private initiative and enterprise, they continued to pin their faith to these virtues, even though circumstances in which they had been so effective gradually changed. They could not persuade themselves to believe that there was any wisdom in the intervention of the government in the regulation of their own life except for the purpose of maintaining public peace at home and ensuring the protection of the country's frontiers from external attacks. In view of this attitude and temper of the people, government intervention for ameliorating and removing social evils like those enumerated above was out of the question until recently.

It is true that in the early twenties when unemployment and economic distress became widely prevalent as a result of trade depression, a commission was appointed by the Federal Government to go into the question of unemployment and suggest remedies. The recommendations which the commission made in its report were, however, never acted up to. Depression proved to be shortlived and as prosperity returned, neither the

government nor the people paid any attention to the findings of the commission. Just as the work of this federal commission became abortive, so the efforts made by a number of State Governments in this connection also became ineffective. They were studying the question of unemployment with some amount of care and attention. Bills also were introduced in some of the State legislatures providing for unemployment insurance. But as prosperity returned, these bills were dropped. It was only the State of Wisconsin which undertook to pass a measure for providing security to its citizens, though only on a limited scale.

The slump which overtook the country in 1929 was, however, more continuous in character and more devastating in its effect. President Roosevelt, on his accession to the White House in 1933, became convinced that something must be done to alleviate the distress from which people were suffering and to insure against such distress in the future. The necessity of intervention on the part of the Federal Government in matters of relief was brought home to him and on two occasions he outlined a programme of such intervention in his messages to the Congress. The first message was delivered by him in this connection on June 8, 1934 and the second on January 4, 1935. He clearly stated in these messages that among the objectives which the Federal Government would have in view, "the security of the men,

women and children of the Nation" should be placed first. He further pointed out that this security had three factors: (*i*) decent homes to live in, (*ii*) development of the natural resources of the country so that full opportunity may be afforded to the people for their engaging in productive work, and (*iii*) the provision of necessary safeguards against the major misfortunes of life.

The Social Security Act which was passed by the Congress in 1935 as a result of these messages, was concerned with the third of the factors of the security of men, women and children of the country. It provides safeguards against the major misfortunes of life, "which cannot wholly be eliminated in this man-made world of ours." The purpose of the Act was to alleviate economic distress which is found even in normal times among the temporarily unemployed, among dependent children, and among the aged and the blind. Its further purpose was "to strengthen maternal and child welfare, public health and vocational rehabilitation services."

The Act provides for the establishment of a Board under the Federal Government to give effect to its purposes. It was to be composed of three members, appointed by the President with the advice and consent of the Senate. The President was to designate the chairman of the Board and to see that in appointing the three members he did not choose more than two of them from one

political party. According to these provisions the Social Security Board was constituted by the President immediately after the passing of the Act, and a number of Bureaus [1] was set up under the Board to take charge of the different branches of its activities.

We may first take up the working of the plan of old-age insurance which the Act provides. We take this up first mainly on the ground that the principle of the administration of this plan is basically different from the principle adopted in the administration of the other aspects of the Social Security Act. The old-age insurance plan is administered entirely by the Federal Government. The State Governments have no share in it. The working of this part of the Act does not, therefore, illustrate Federal-State co-operation, but it does illustrate the assumption of authority and power by the Federal Government in a sphere which was not allotted to it by the framers of the Constitution of the country. Jurisdiction was assumed by the Federal Government in this field only because of the exigencies of circumstances and it is one of the many illustrations of the fact that the distribution of powers between the Federal and State Governments made in the

[1] Apart from certain offices as those of the Actuary and the General Counsel, the Board has six Bureaus—(*i*) Bureau of Old-Age Insurance, (*ii*) Bureau of Public Assistance, (*iii*) Bureau of Unemployment Compensation, (*iv*) Bureau of Research and Statistics, (*v*) Bureau of Business Management and (*vi*) Bureau of Accounts and Audits.

horse and bogey age of the eighteenth century has become out of tune with the circumstances of to-day.

The old-age insurance plan has been effective since 1937. It provides that a worker who has attained the age of sixty-five will receive a monthly benefit payment from the Federal Government on his fulfilling two conditions. The first is that his total wages from employment[2] after December 31, 1936 and before he has completed the age of sixty-five must not be less than two thousand dollars. The second condition is that these wages must be earned by him in five calendar years after 1936 and before the completion of his sixty-fifth year. In other words none can avail this monthly benefit payment before 1942. The question may necessarily arise as to whether those who may not fulfil all these requirements will not receive any payment. The Act provides that a worker who would complete his sixty-fifth year before 1942 would receive a single-cash payment which would be three and half per cent. of the total wages which he had earned after 1936 and before completing the sixty-fifth year. These payments began in 1937.

The administration of the old-age insurance plan has been conducted on the basis of a conti-

[2] Certain employments are excluded from the operation of the Act, *e.g.*, Agricultural Labour, Domestic Service in a private home, Employment under the Federal, State or Local Governments, etc.

nuous wage record for each employee. Every three months each employer has to report the amount of each employee's wages to the Bureau of Internal Revenue in the Department of Treasury and this Bureau forwards the reports to the Social Security Board. The administration of the scheme is financed by an income tax[3] on employees and an excise tax on employers. The rate of tax on employers and employees is the same. In the first three years (1937, 1938, 1939) it was one per cent. of the wages, in the next three years it is to be one and half per cent., then for three years it is to be two per cent., then for three years two and half per cent., and in 1949 and thereafter it is to be three per cent.

As it has been pointed out above, the scheme for affording social security in other aspects are worked on a different basis. The Federal and State Governments co-operate in carrying them out. Such co-operation has this advantage that it ensures as much the fullest consideration of the special economic and social problems of the different localities, as it does ensure the maintenance of the national unity of purpose. The responsibility is primarily regarded as that of the States and consequently the agency under the control and supervision of which the programme has to be carried out is also that of the States. But it

3 This income tax has nothing to do with the general income tax.

should be recognised that such misfortunes as unemployment are not the results of local conditions alone. In fact they are often the result of conditions over which the States as such have no control. Nor can they tackle these conditions and misfortunes resulting from them, depending on their own resources. They must be tackled on a national basis. The National Government must step in and help in the solution of the problems both by financial aid and by fixing a minimum national standard to be maintained in all localities. Without such national intervention and co-operation the backward areas will either be deprived entirely of public assistance in major misfortunes of life or they will have to be satisfied with the operation of some incomplete and insufficient schemes of welfare.

Let us in this connection take up first the question of unemployment insurance. The Social Security Act does not provide for unemployment benefits. But it does create conditions under which the different States may pass legislative enactments providing for such benefits. The obvious object of the framers of the Social Security Act was not that the Federal Government should undertake full responsibility for unemployment compensation as in the case of the old-age insurance, but to stimulate the passing of laws by the State legislatures according to the conditions laid down by the Social Security Board and to

offer federal financial aid to the State Governments in carrying out the scheme of unemployment compensation which these laws would introduce.

The Social Security Act provides for the imposition of a federal excise tax [4] on employers, who may happen to employ eight or more workers. But if any State legislature enacts a law providing for the payment of unemployment benefit and lays a tax to this end on the employers, the tax to be paid to the State Government may be credited by the employers against the federal tax they have paid. But the amount so credited against the federal tax must not be more than ninety per cent. of what the employers have paid to the Federal Government. So the employers have in any event to pay the tax to the Federal Government. But if the State legislatures enact unemployment compensation measures, the State Governments may appropriate to themselves for this purpose a large share (up to ninety per cent.) of the proceeds of this tax. This is an incentive which stimulated the State legislatures to undertake such legislation one by one.[5]

But if the employers are to have the benefit of the tax offset, as referred to in the previous paragraph, it is necessary for the State legislatures

[4] The tax is three per cent. now.

[5] The employers with all their influence would have opposed unemployment compensation laws. But as they had to pay the tax in any event, they became reconciled to the enactment of such laws by the State legislatures. By July, 1937, all the forty-eight States passed such laws.

to secure the approval of the Social Security Board in respect of the unemployment insurance laws which they may undertake to enact. These laws again must contain certain particular provisions, if they are to be so approved by the Board. One of the provisions which every unemployment insurance law must contain is to the effect that all the money which a State Government may receive in the unemployment fund must be handed over to the Secretary of the Treasury of the Federal Government, who will credit it to the Unemployment Trust Fund. Another provision to be contained in the laws is that all the money so received must be expended only in paying unemployment compensation (exclusive of expenses of administration). So all the money collected by the States is deposited to their credit in the Unemployment Trust Fund of the United States Treasury. The money thus deposited may be withdrawn by the States concerned no doubt, but only to pay compensation to the unemployed. No portion of the fund can be spent by the State Governments in maintaining necessary establishment for administering the measure. They are not, however, quite in a position to maintain on their own account the necessary staff required for giving effect to the unemployment compensation laws. So it has been arranged that the money required for the purpose will be supplied by the Federal Government.

From what has been laid down in the previous paragraphs, it must be clear that in providing unemployment compensation, the Federal and State Governments co-operate actively with each other. The laws are passed to this end by the State legislatures and they are administered also by the agencies of the States. But the Federal legislature by imposing a tax on the employers stimulates the State legislatures to undertake such legislation. Secondly, the laws which the States happen to pass have to conform to the conditions which the Social Security Board lays down. Thirdly, the money which the State Governments raise is spent entirely in giving compensation to the unemployed. The expenses of administration are borne by the Federal Government.

As the State and Federal Governments co-operate in providing compensation for temporary unemployment, so also in providing public assistance under the Social Security Act to the aged, to the blind and to the dependent children, they similarly happen to co-operate. Of course the co-operation in these fields is not ensured in the same way as in the field of unemployment compensation. In all the three forms of assistance just referred to, the States take the initiative in making their own plans. These plans are, however, submitted to the Social Security Board by the States concerned. The Board is authorised

by the Social Security Act to approve of these plans if only they conform to several major conditions, which are that such a plan shall be in operation throughout a State, and that it shall provide for efficient administration under the direction or supervision of a single State agency. Once the plans have been approved, they go into effect in the States with requisite financial assistance from the Federal Government.

Old-age assistance should not be confused with, but should be clearly distinguished from old-age insurance. The former is administered by the State Governments and the latter entirely by the Federal Government. Secondly, payment under the latter is made to an individual not because of his need but by virtue of the fact that he has earned wages up to the age of sixty-five and is now entitled to the payment of the monthly pension. Old-age assistance is, however, granted on the basis of individual need and is not in any way related to wage-record. The needy individuals who have attained the age of sixty-five years, may apply for such assistance which is financed by money received from three sources—the local authority in the State, the State Government and the Federal Government. The Federal Government is to co-operate with the State and local governments by contributing half of the total payment to be made to an individual applicant. The other half is to be financed by the State and local

governments concerned. Of course in case the State Government decides to pay more than thirty dollars to an individual, the Federal Government would still pay only fifteen dollars as its share. In other words up to the limit of this maximum, the Federal Government is to contribute to the extent of fifty per cent. of the assistance rendered.

In regard to public assistance to the blind and to the dependent children, the same principle of co-operation is observed between the Federal and State authorities. The plans of work have to be submitted as in respect of old-age assistance and when they are approved, the federal grant-in-aid is available. In the case of the blind the grant amounts to fifty per cent. of the total payment to be made to an applicant. But in regard to dependent children the Federal Government contributes one-third and not one-half of the total expenditure.

Apart from the provisions for old-age insurance and the three kinds of public assistance, which have been delineated above, the Social Security Act also provides for the extension of services for maternal and child health, for crippled children, for public health and vocational rehabilitation. For maternal and child welfare the Children's Bureau of the Department of Labour was designated as the federal agency in carrying out the federal part of the responsibility. For maternal

and child health services, the Federal Government makes a grant of three million and eight hundred thousand dollars. In order that this grant may be received from the Federal Government, the States have to fulfil certain conditions, the most important of which is the submission of a plan to the Chief of the Children's Bureau for approval. The second condition is that the funds granted by the Federal Government must be matched in part by the State Government. Similarly in regard to welfare services for the protection and care of homeless, dependent, and neglected children, the Federal Government appropriates one million and five hundred thousand dollars for grants to the States. In areas which are predominantly rural this money may be spent by the local authorities in meeting part of the cost for the services which they may happen to be rendering in this regard. The actual plans for such services are, however, to be developed jointly by the State agency and the Children's Bureau of the Federal Government.[6]

1. The materials embodied in this chapter have been largely drawn from a number of publications of the Social Security Board, *e.g.*, A Brief Explanation of the Social Security Act (Information Service *Circular* No. 1), 1938, Public Assistance under the Social Security Act for the Needy Aged, the Needy Blind, Dependent Children ; How the Federal Government Functions in a Federal-State System of Unemployment Compensation (being the full text of a speech delivered by George E. Bigge, Member, Social Security Board, before the University of Virginia Institute of Public Affairs, on July, 11, 1938); Unemployment Compensation; Some Questions and Answers.

The passing of the Social Security Act in 1935, was certainly an important landmark in the evolution of the new federalism in the United States, which is based on Federal-State co-operation in many fields of activity.

CHAPTER XVI

INTER-STATE TRADE BARRIERS AND FEDERALISM

In previous chapters, we have discussed the enormous growth in the power of the Central Government since it was first constituted in 1789. We have seen how by the inevitability of circumstances and by a liberal interpretation of the clauses of the Constitution, the Central Government has been allowed to assume powers, which were certainly not contemplated for it by the fathers. It is true that as a result of such expansion of federal authority, the balance of power between the units and the federation has been considerably affected. It can no longer be said that the principle which the framers of the Constitution wanted to observe in regard to the relations between the Federal and State Governments has been maintained in tact. The States were expected to remain sovereign entities in every sphere of authority, which was not definitely and specifically vested by the Constitution in the Federal Government. Actually, however, because of the revolution in the economic and social conditions of the country and because of the consequent pro-federal interpretation of the Constitution, there has been continuous invasion upon State-rights.

But although the jurisdiction of the States has been adversely affected to a large extent and their character has changed to a great degree, it is not a fact that the State Governments have become merely the local agents of the federal authority. They still very largely maintain their autonomy and independence. It is also true that local patriotism of the people has not been undermined altogether. They still think to a great extent in terms of their own States. That this is so is illustrated very conspicuously by the recent development of the trade barriers, which States have set up against one another. Localism is ingrained in human nature, and it is still more so in the people of the United States, whose local patriotism finds easily an embodiment in the Governments of the States. This localism again finds expression at no time more vigorously than during a period of economic crisis. When there is slump throughout the country and everybody in every part happens to suffer, the people of a particular State are apt to think that if they could exclude the articles of other States and encourage only their own enterprises and purchase their own produce, they might possibly be better off. In days of plenty people can afford to be generous in outlook and liberal in policy. But in days of stress, they inevitably become self-centered and their policy becomes selfish. It was out of such a policy to gain selfish ends that the

inter-state trade barriers have been increasingly set up.

We have pointed out in another chapter that the demand for tariff union was a great motive force in the framing of the new federal constitution of the United States. The fathers had become disgusted with the commercial barriers, which one State was setting up against another under the Articles of Confederation. They found that, as a result of such barriers, bad blood was being created among the States, so much so that they happened to regard one another with greater bitterness than they even regarded a foreign state. In fact it was their experience that nothing was a greater breeder of inter-state hostility than diversity of tariff policy. They became convinced that a federal union without being at the same time a customs union was a downright absurdity. If there could be no free flow of goods from one State to another and if the produce of one State could have no free market in another, the federal union would be engulfed in ruin in the course of a few years

As the fathers of the American Constitution had no illusion about this matter, they withdrew all control in respect of tariff from the States and vested it in the Central Government, which was to regulate both foreign as well as inter-state commerce.[1] Goods would on this account have a

[1] "The Congress shall have power .... to regulate commerce

free run from one end to another of the Union. For long the United States was in fact regarded as the largest free-trade area in the world. Recently, however, under cover of the spending and the Police (Public Health) powers, the State Governments have succeeded in undermining this character of the United States. It can no longer be said to be a free-trade area. Free flow of goods from one State to another has become, in many respects, impossible.

It is a great symptom of State patriotism and local feeling that as many as thirty-one [2] States out of a total of forty-eight have resorted to a policy of giving compulsory preference to products made within the boundaries of the State.[3] To this end laws have been passed by the States from time to time to the effect that all the purchases made by the State as well as local authorities within the State must be of local origin. This policy has been adopted in order to stimulate local production

with Foreign Nations and among the several States." Section 8, Article I of the Constitution.

[2] Of these twenty-six "have enacted laws declaring some type of compulsory preference for made-within-the-borders products" and five have enacted retaliatory laws "which make it unlawful for any public official to expend public money for supplies, equipments or materials produced in the States which discriminate in public purchases."

[3] Apart from laws which thirty-one States have passed by way of discriminating "against the purchase of out-of-State products for public use", many States have financed from public funds "Know your States' products" advertising campaigns as a result of which individual citizens may prefer local products.

and to enable the local firms to win in competition with firms outside the State. We find that as early as 1897, California passed a measure, by virtue of which all purchasing officers of the State, counties and cities were instructed to give preference to "supplies and other goods grown, manufactured or produced in California." In 1901 a measure similar in character was undertaken by the State of Oregon. It empowered the Government to give preference to locally produced articles in the purchase of supplies "for use of State institutions or sub-divisions thereof." In 1911, the State of Missouri enacted a law by virtue of which the State might in certain circumstances give preference to the State forest, quarry and mineral products in the erection of State, county and municipal public building, "when prices and quality are in line with outside bids."

So we find that the policy of giving preference to local products has been adopted by the State Governments for nearly four decades. But since 1930 this policy has been extended very widely and comprehensively. Obviously this has been due to the great economic slump which overtook the country in 1929. The Governments of the States, instead of thinking in terms of the whole Union, thought mostly in terms of the areas immediately under their own jurisdiction. They believed that their duty was first and foremost to the people

who lived within their own frontiers. Accordingly it became their policy to bolster up the declining industries of the State by giving preference to the production made there.[4]

Preference given to local products in the purchase of supplies is only one method of keeping out the articles produced outside the State. Other ways more effective as well as more exasperating in character have also been devised to keep out competition from the other States and protect thereby the local industries and agriculture. In regard to intoxicating liquors, the Governments of the States have found sanction in the national Constitution itself in discriminating against out-of-state products. Liquor trade barriers differ in this respect from barriers which the States have set up in regard to other trades. The Twenty-first Amendment of the United States Constitution which repealed the Eighteenth Amendment of 1919 provides that " the transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited ".[5] In other words, under this amendment

[4] A full list of the States and the discriminatory laws which they have passed is given in a Bulletin entitled "Public Purchase Preference Laws As Trade Barriers" by Dr. F. E. Melder, published by the Council of State Governments in "Trade Barrier Research Bulletin Series," Chicago, 1939. All the quotations and facts in this paragraph are taken from this Bulletin.

[5] Section 2.

alcoholic beverages can be brought into a State from outside only according to the laws and regulations, passed by the Government of that State. Taking advantage of this provision of the Twenty-first Amendment "about half the States have imposed discriminatory beer measures" by way of protecting local breweries against competition of the out-of-state breweries. The most common form of such discrimination consists in the requirement that outside breweries must obtain certificates of approval before "shipping into the State." The license fees in this connection vary from 5 to 750 dollars. Frequently these breweries have also to procure both a regular and special license "in order to solicit and ship into the State." Apart from these restrictions a variety of other discriminations is also imposed in different States. Iowa, which is a large barley grower, requires, for instance, 'that all beer sold in the State be made from not less than 66⅔ per cent. barley.[6]

As in regard to alcoholic beverages so also in respect of dairy products, the States have in

[6] The Council of State Governments Bulletin on State Discriminations Against Out-of-State Beers by Thomas S. Green, Jr., 1939, Chicago. It contains a summary of the regulations of different States. See also the Chapter on Alcoholic Beverages in 'Barriers to Internal Trade in Farm Products,' Washington, 1939. Whether the State laws discriminating against out-of-state liquors are constitutionally valid or not, was tested before the Court in State Board of Equalisation of California *v.* Young's Market Co. (1936). The Court in this case upheld a California statute that placed a 500 dollars license fee on importers of out-of-State beer. See "Barriers to Internal Trade," p. 31.

many instances erected trade barriers against one another. The object in view has been two-fold—(*i*) to protect the health of the consumers of dairy products by insuring their clean and wholesome character and (ii) to stabilise the dairy industry and to increase the purchasing powers of dairy farmers. We may first take up the question of the supply of fluid milk in this connection. In many States the milk control laws have been passed in order that the health of the milk consumers may be properly safeguarded. In some of them the farms which supply fluid milk have to be licensed or inspected by the officials of the State concerned. If farms located in other States happen to supply some portion of the demand, they also have to conform to these regulations. Formerly, the milk consumed by the State people came from near-about places. But in the twenties refrigerated glass-lined tank was introduced for use in milk transportation both by railway and by truck. As a result of this innovation it has become possible for milk from great distances to be supplied. In many States in consequence the local suppliers found it difficult to meet the competition from outside and they began to clamour for protection on that account. The State authorities in many areas have responded to this clamour and provided this protection by refusing to send inspectors to inspect the

out-of-state farms. As without such inspection, milk cannot be sold in the market, a barrier has been raised in this indirect way against the importation of fluid milk from across the State boundaries. It is mostly in the eastern States like Connecticut, Rhode Island, Massachusetts, that inter-state barriers in this field have become especially popular. Connecticut, for instance, has adopted dairy legislation which directs the State Commissioner to refuse to inspect farms outside the 'natural milk-shed.'[7]

Excise taxes levied upon margarine and license taxes imposed upon the marketers of this product by a large number of States have also the result of establishing a barrier in inter-state trade. They were introduced by State laws with the real intent of affording protection to the producers of butter in the dairy States, who were finding it difficult to meet competition of substitutes like margarine. They demanded that their produce should be protected by the exclusion of such substitutes coming from other States. The State Governments concerned responded to this demand and they have imposed the taxes as referred to above. Now although the objective with which the taxes are levied is obvious, not unoften it has been veiled under cover of raising

[7] *See* Chapter on Dairy Products in "Barriers to Internal Trade in Farm Products." Also see the Council of State Governments Bulletin on Trade Barriers and Dairy Products, 1939, Chicago.

revenues. When the constitutionality of the laws was questioned, the Court took it as a valid ground and upheld them accordingly.[8]

Some of the State Governments have even gone to the length of imposing special and discriminatory taxes in order that the competition from other States may be ousted in the business field. If for instance a corporation of one State is to do business in another, it may be subjected by the Government of the latter to a special tax and license fees. When again an insurance company proceeds to do business in a 'foreign' State it must have certain proportions of its assets invested within that State. In case this condition is not fulfilled, discriminatory premium taxes may be imposed upon it.

These are only a few of the different types of barriers, which the States have set up against one another in regard to trade and commerce. There are various other ways also by which the independence of the States has been emphasised. The movement of labour across the State boundaries has been, for instance, restricted to a great extent by the requirement, imposed in certain cases, that the migrants must give sufficient proofs as to their ability to remain self-supporting.

So far the trade barriers which have been erected among the States have not been declared

[8] *See* Chapter on Margarine in Barriers to Internal Trade, etc.

unconstitutional in all cases.[9] In many cases, in fact, they have been declared by the courts to be consistent with the provisions of the Constitution and the powers of the States. But already a great opposition to this practice is noticeable throughout the Union. It is likely to grow in strength as years pass by. A large body of people has been convinced that this practice of trade barriers is on the one side a menace to the development of commerce and trade in the country and is on the other a great danger to the spirit of union among the people and to amity and concord among the States. Both the Federal Government and non-official organizations in the country have become conscious of the danger, which the practice involves, and are accordingly moving in the matter. The Bureau of Agricultural Economics, United States Department of Agriculture, has already submitted 'A Special Report' to the Secretary of Agriculture. It is

9 In several cases they have been declared unconstitutional One instance may be cited. Several years ago the Commissioner of Health of Baltimore ruled that cream for manufacturing ice cream could not be brought from a greater distance than 50 miles from the city except when 'Emergency' shortages were declared to exist. This ruling was contested in the federal district court which declared it invalid. The Judge observed on the occasion that "when local regulations under the guise of police power, are not reasonably adopted to accomplish these legitimate ends (*i.e.*, protecting the health, morals and welfare of the community) and constitute a direct burden on the inter-state commerce, they must fall." *See* Miller v. Williams 12, Fed. Sub., 241 (1935).

entitled 'Barriers to Internal Trade in Farm Products' which has been referred to in the preceding pages and which contains a reasoned appeal to the States concerned against the trade barriers in regard to the agricultural products, which they have set up against one another. The Council of State Governments, an organization about which we shall speak later, has also taken up this question in earnest. Under its auspices, a representative Conference was held in Chicago in April, 1939, to study and discuss the dangerous implications of this unwise practice. The Council has also, through its economic experts, published a number of pamphlets, describing the trade barriers, which the States have already erected against one another in different fields. These pamphlets bring out into clear relief the menace to trade and prosperity which these barriers happen to constitute.

It is too early yet to see if these efforts will actually succeed and the trade barriers will be removed. The number of people who believe in the United States as a great free trade area, is evidently very large. But it is not easy to say if the opinion of even this large number will ultimately count. The trade barriers have their origin in the desire of the local people to reserve the local market for local production. This desire was strengthened by the great economic depression which began in 1929. But although

the depression has been alleviated to a great extent, and although it may be removed altogether in the near future, still it is doubtful if in prosperity the people will give up the policy of maintaining their local market for local products, which they had adopted in adversity. It is the ordinary experience of all men that it is very difficult to do away with a policy of protection, once it has been adopted. The cause, which may have inspired this policy, may disappear after sometime, but still the policy is allowed to continue. The interests, which have benefited so far by this policy of trade barriers, will not certainly allow the State Governments to give up this practice without a struggle, and everybody knows that it is difficult, if not impossible, for many of the State Governments to withstand the pressure which may be brought to bear upon them by these interests. So the easiest way by which the trade barriers may be removed is by way of adverse judicial decisions issued through the Supreme Court of the United States. Will the Court act as a body of far-seeing statesmen ?

Localism is a contagious disease. If it takes hold of any State in any way, it inevitably spreads to its neighbours and appears in other forms and ways. Unless, therefore, the trade barriers are removed early, they may engulf altogether the nationalism which has developed in the country in course of the last one century and a half.

CHAPTER XVII

Conclusion

We have shown, in as much detail as the compass fixed for the book has allowed, how the change of circumstances and environments made inevitable for the Federal Government to assume new jurisdiction and powers from time to time. But this increasing growth in the powers of the Federal Government and the corresponding deterioration in the position of the State Governments should not mislead the readers to think that State particularism is now dead in the United States. In the preceding chapter (on Trade Barriers), we have seen how localism is still a most active force in this country.) The inter-state trade barriers which are choking so much the flow of commerce from State to State may be only a passing phase and removed in the next few years. But otherwise the spirit of localism will continue to imbue the mind of the people.

State particularism has in fact been ingrained in the people of the United States. The inhabitants [1] of the very small State of Rhode island, for instance, may be easily and advantageously

[1] The number of people is 681,000 and territory is only 1,300 square miles.

absorbed in the neighbouring State of Connecticut. But such is their local sentiment that they can never be persuaded to entertain any suggestion like this. They are proud of the State, however small its size and population may be. They are further proud of its chief city,[2] with which so many of their interests are closely bound up. It is interesting to remember in this connection that State patriotism sways the mind not merely of those people who have been resident in a State for generations and whose forefathers took active part in its affairs. The people of the States which were carved out only recently are also found to be almost as local in their sentiment. Nor is the case different with people who are new immigrants into old States, to which they do not feel less attached than the old settlers. Utah and Wyoming are neighbouring States and entered the Union as States in 1896 and 1890 respectively. The population of the former is only five hundred and fifteen thousand and that of the latter is less than half that number (two hundred and thirty-two thousand). The two States may easily be combined into one State with larger population and greater resources. But although the States are comparatively new and the traditions of the people are not old and far-reaching, still the combination is out of the question. Arizona which entered the

Providence (which has 243,000 inhabitants).

Union as State only in 1912 and has a population of only three hundred and eighty-six thousand is similalrly, though inexplicably, adamant about maintaining its separate identity.

Apart from the fact that much of this local feeling is ingrained in human nature and cannot be avoided on any account, there are other reasons also why many people in the United States still believe in the autonomous jurisdiction of their own States and are unwilling to allow their status to be undermined. One of these reasons consits in the fact that these people cannot repose as much confidence in a distant government as they may have in the one which works under their own eyes. We have seen already how the American people in the eighteenth century were not enthusiastic about the creation of a central government. Many of them were in fact opposed to it. This was because they thought that it would not be easy for them to control a government which would be so distantly located. This idea is still active in the mind of many Americans. They are still convinced that democratic government can properly work only when its jurisdiction is limited to a small area and works under the supervision of watchful citizens. If, however, most authority is concentrated at Washington, and the Central Government becomes all-powerful and its authority all-pervading, public administration would become more and more irresponsible and undemocratic. It

is difficult, if not impossible, to mobilise, on right and proper lines, any public opinion of such a vast country with such a huge concourse of people, as the United States. In view of the fact that public opinion, properly mobilised, cannot be brought to bear upon the government working from a distant capital, it becomes possible that such a centralised government may act as it pleases, irrespective of the wishes of the people. Democracy in other words may be increasingly relegated to the background and absolute government may be slowly and insensibly substituted in its place.

This conviction has been strengthened to a great extent by the rise of dictatorships in some of the European countries. A section of the American people seems to be more or less enamoured of fascist dictatorship and may like to have it introduced in the country. It is apprehended that in case the Central Government is allowed to grow in power and authority and if the autonomy of the States is allowed on that score to be undermined, this section will have an excellent opportunity of transforming the government of the country into a dictatorship and achieving thereby its political ideal. Accordingly it is contended that in the interests of democracy, the government of the United States should remain as diversified and decentralised as possible. On the one side the autonomy of the States should be maintained in all its essentials, and on the other the autonomy

and independent jurisdiction of the local bodies should be similarly kept in tact.[3]

So whatever may be the reasons, localism is not dead in the United States. Most people will not be reconciled to the replacement of the existing federal system by any unitary and centralised governmental arrangement. But while such is the sentiment of many, it is pointed out by some with cogent arguments and factual illustrations that the federal system has definitely become out of date in the United States. It does not fit in at all with the changed circumstances of the country. Many of the functions which could have been discharged efficiently on a State basis hundred years ago, do not admit of proper administration on such a local basis to-day. If they are to be successfully tackled at all, they must be tackled only on a national basis. It was for instance decided by the Supreme Court in 1868 [4] that insurance was a State subject

[3] The writer was personally told by most people whom he questioned about this subject that this opinion was held by a large body of thinking people in the country. His attention was also drawn to an article in the "State Government" of February, 1939, entitled "The Roots of Democracy" by Felix Morley, Editor, The Washington Post. He says, "One of the insistent arguments for retaining the federal character of our government is the present rapid growth of totalitarian philosophies. Both Nazi-Fascism and Communism ...... are dependent for success on the complete subordination of local government to centralised authority. It follows that a most effective check to the growth of any form of dictatorship in the United States lies in the preservation of State's Rights. They form an insurmountable barrier to the insidious growth of the totalitarian idea........."

[4] In Paul v. Virginia.

and could not be dealt with by the federal legislature. It was, therefore, thrown into the hands of the States. But an insurance company certainly does not confine its business to one particular State. Now when the laws of the different States vary a great deal, some being stringent and some lax, it can be imagined as to what difficulty the companies may have to encounter in carrying on with their business. Similarly laws of marriage and divorce vary from State to State. A man legally divorced and married for the second time in one State may be arrested on a charge of bigamy in another. Obviously there is something wrong in a situation like this. In one State a girl may be lawfully married at the age of twelve but in another it will be an offence. Laws of divorce vary in the same way from State to State and some have pointed out that because of this diversity divorces have actually increased. In those States where the law is lax, residential qualifications for availing this law are lowered out of consideration for the hotel and other interests and married couples troop into these States to be divorced from each other. Another illustration may be taken. Regulation of motor traffic is a State subject. Accordingly, the different States have gone in for different regulations. The result is absolute confusion for those who undertake inter-state motor-driving.[5] Such illustrations may be

[5] *Cf.* W. Brooke Graves—Uniform State Action (1936), Chapter 1. Professor Graves, of course, cites these facts not to advocate the transfer

multiplied. But enough has certainly been said to show that the administration of many subjects on a State basis has become an anachronism.

Secondly, it is pointed out that simply because the system of government in the country is federal, the position of the government which alone may deliver the goods is dubious and uncertain. The Central Government which alone may pass effective legislation to regulate the problems of the complicated industrial civilisation of the country, does not know its own position with any amount of certainty. So long as the federal system remains in tact, any action which the Congress may take is subject to veto by the United States Supreme Court whose attitude varies from time to time and almost from case to case. The system under which the regulation of public affairs depends not upon the decisions taken by the accredited representatives of the people but upon the whims of five[6] irremovable members of the federal bench has certainly become intolerable. It is true that the Central Government has undertaken legislation in many fields in recent years and ministered thereby to the welfare of the people to some extent. But what has been done is not enough. Much more requires

of these functions to the Central Government but he cites them to advocate co-operation between the States in making uniform laws and regulations on these subjects.

[6] The number of Judges on the Supreme Court Bench is nine.

to be done. It is, however, most uncertain if further interference by the Congress will be approved of by the courts. So it is argued that the only solution of the problem consists in the scrapping of federalism altogether.

This school further points out that although the "federalists" cite the ground of democracy in support of the existing arrangement, actually nothing is more unfavourable to the working of democratic government than the division of the country into forty-eight States. In many of the small States, the influence of capitalistic corporations is so predominant and so far-reaching that the State Government is worked not really in accordance with the wishes of the people but according to the dictation of these corporations. These States are virtually the pocket boroughs of these industrial concerns. Professor H. J. Laski of the University of London who has been familiar with the affairs of the States for years observed in a paper[7] some time ago that "Delaware is merely a pseudonym for the *du ponts* and Montana little more than a symbol of the Anaconda Copper Corporation." It is not possible for the Governments of small States to control these concerns. On the other hand it is these concerns which control these Governments. So in the interests of democracy itself it is desirable that

7 "Obsolescence of Federalism" in the New Republic of May 3 1939.

the federal system should be abandoned in favour of some unitary arrangement.

It is unlikely, however, that this extreme view will commend itself to many people in the United States. We have on the contrary seen that most of them are against any arrangement of things in which the States as autonomous entities have no place. But while this counsel for scrapping the federal system may not appeal to many, we should not overlook the fact that a large body of thinking people in the country has been convinced that inter-state co-operation in many of those subjects which are within the jurisdiction of the States as such has become necessary and desirable. Such co-operation should be brought about without involving any intervention and control on the part of the Central Government. It should, in other, words be ensured outside the federal system. But still it should be stimulated and organised. They still believe that the secret of freedom which the American people happen to enjoy and the great success which they have so far achieved as a nation consist very largely in the federal character of their government. They cannot reconcile themselves in any way to the engulfing of this system by some centralised governmental mechanism. But they believe at the same time that although the States should continue to exist as autonomous units of the federation, they must not carry out their functions

and discharge their responsibilities in their own way irrespective of the policies pursued by their neighbours. Some machinery of voluntary co-operation must be at work and through it the different States should have an opportunity of consulting the lines of work of one another and pursuing as far as possible a uniform policy.

The constitution itself provides, of course, for co-operation among the States with the previous assent of the Congress.[8] It is also true that in some cases such cooperation has been resorted to. In exploiting the rivers which pass through more than one State, such co-operation becomes necessary. Actually the States of New York, New Jersey and Delaware had to enter into an agreement in regard to the use of the river, Delaware. Similarly the States of New York and New Jersey have co-operated in the management of the port of New York, in building the Holland Tunnel and in erecting the Washington Bridge. Apart from such co-operation which has sanction in the Constitution and which can be enforced within the federal system, the States have otherwise also co-operated with one another. Formerly, such co-operation was mostly of a regional character. The States belonging to a particular region would consult and co-operate with one another

8 "No State shall, without the consent of the Congress, . . . enter into any agreement or compact with another State. . . ." Art. 1, Sec. 10, Clause 3.

in matters which might be peculiar to that region. The New England States, for instance, have always felt themselves drawn towards one another. They have formed a bloc by themselves since the formation of the Union. The Governors of these States would meet from time to time, discuss affairs peculiar to the bloc and decide upon measures which they thought desirable and effective.

But spontaneous co-operation among the States on a regional basis could not certainly be carried very far, however desirable and effective it might be within a limited sphere. There are many fields in which all the States should pursue a common policy and take the same lines of action. Such co-operation, however, cannot be spontaneous. It has to be stimulated by some well-established organisation. Fifteen years ago in 1925 Henry W. Toll, then a State Senator of Colorado, was convinced that something must be done in order that the legislatures of the different States might pursue their policies more or less on the same lines. It was found that the legislatures of most States had no knowledge of the experiences of other States and they accordingly passed laws as they understood best without any reference to the success or failure of the experiments which might have been made in other parts of the Union and without any motive of co-operating with their neighbours in the administration of any subject of

importance. Toll decided to do something by way of breaking this isolation. He undertook the publication of a four-page leaflet, *The Legislator*, in order to stimulate interest in the members of the legislatures as to the work done in other States. Then one year later, in 1926, the American Legislators' Association was constituted. This Association, however, could not fire the imagination of the legislators and enlist their sympathy and support. It has not died out yet but it has been in a moribund condition since its birth fourteen years ago. But the little work the Association did from year to year created gradually an atmosphere in which some other organisation, less unwieldy in character and more catchy in name, might show better results. Actually in 1935 such a new organisation was set up. The Council of State Governments was brought into being.

The Council of State Governments is a joint agency created by the State Governments. Every State, in the first instance, establishes a Commission on inter-state co-operation. Such a Commission is composed usually of fifteen members—five members from the State Senate, five from the State Assembly, and five appointed by the Governor. All these Commissions together constitute the General Assembly of the Council of State Governments. The Council has a central secretariat at Chicago and a district office at New York City. It is likely that other district offices also

will be opened in the future. The central secretariat acts as secretary to the different inter-state conferences which it organises and holds from time to time. The Governors of the different States, for instance, meet at a conference at regular intervals to discuss the vital problems of their States. Similarly the Secretaries of State, Attorney-Generals, Speakers, Tax Commissioners, and the Planning Officials happen to meet from time to time in conferences. These conferences are not only organised by the central secretariat of the Council of State Governments but also it acts as secretary to these bodies. It prepares their agenda and supplies materials for discussion.[9] The secretariat runs a monthly journal, the *State Government* in which the inter-state problems are discussed. The organisation is still young and it is not possible to say how effective it will prove to be in stimulating inter-state co-operation and in doing away with many of the defects of the federal system.

It cannot be said that federalism in the United States is on its last legs. Inspite of many pitfalls of the system, it has still overwhelming support in the country. But people, though opposed to its replacement by some unitary and centralised system of government, have appreciated the necessity of setting up a new machinery of inter-state co-operation.

[9] See The Book Of The States, Vol II (Book One), 1937, Published by the Council of State Governments. Chapters IV, V and VI.

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